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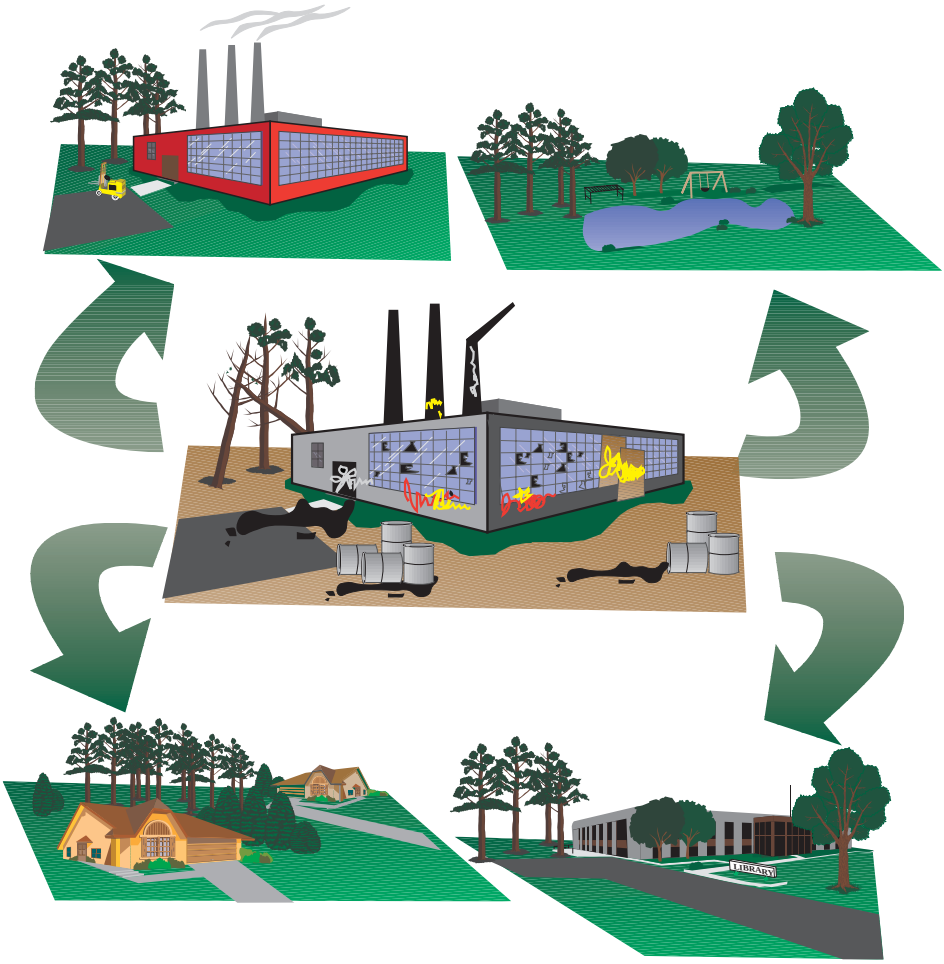
Handbook of Tools for Managing Federal Superfund Liability Risks at Brownfields and Other Sites



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Handbook of Tools for Managing Federal Superfund Liability Risks at Brownfields and Other Sites

U.S. Environmental Protection Agency

Acknowledgement

EPA's enforcement and compliance program has been a partner in the Agency's Brownfields Initiative since its inception. As part of the Brownfields Action Agenda, EPA has developed a broad array of tools to encourage the cleanup and reuse of contaminated property (such as brownfields) and address Superfund environmental liability-based barriers. The *Handbook of Tools for Managing Federal Superfund Liability Risks at Brownfields and Other Sites* is a compilation of those tools to provide the reader with an understanding of federal liability as it relates to real property. With this handbook, we hope to encourage property reuse using the tools to evaluate the benefits of redeveloping a brownfield property against any environmental risks associated with that property.

We want to thank those individuals who contributed to this handbook, starting with the members of the EPA work group led by Elisabeth Freed: Lynne Jennings, Michael Mintzer, Heather Gray-Torres, David Ostrander, Suzanne Bohan, Mark Calhoon, Bill Keener, Bob Roberts, Katherine Dawes, Beau Mills, Randy Hippen, Mike Fitzpatrick, and Karen Kraus, joined by Bob Brooks of the Justice Department. Special thanks also goes to Lori Boughton and Laura Bulatao for reviewing the handbook through its various iterations. In addition to the hard copy of the handbook, you will also find it at www.epa.gov/oeca/osre. For additional information regarding the handbook, please contact Elisabeth Freed at (202) 564-5117. Regional contact for discussions about specific sites are included in Appendix E of the document.

We look forward to working with you in this important field.

Steven A. Herman, Assistant Administrator
Office of Enforcement and Compliance Assistance
November 16, 1998

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Introduction to Brownfields

In the United States, real property is one of the most valuable economic assets. While this country puts most real property to productive and beneficial use, some properties lie abandoned or idled. These properties, called "brownfields," may remain unused or underutilized because of actual contamination from past commercial or industrial use; or, because people fear the property's previous use left contamination. This fear results in relatively clean property remaining idle. Parties that otherwise would redevelop brownfields, therefore, may search out unused property, or "greenfields," to avoid the potential environmental liability associated with potential clean up.

EPA firmly believes that the cleanup of contaminated property including brownfields, and

Definition of "Brownfields"

The U.S. Environmental Protection Agency (EPA) defines brownfields as abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.

the clarification of federal cleanup liability, are the building blocks for sustainably recycling previously used property. By fostering the redevelopment of brownfields, EPA is helping to protect greenfields from commercial and industrial development.

EPA recognizes that private parties may believe federal environmental laws and policies have created roadblocks to reusing property. The federal environmental law that most affects the cleanup and reuse of brownfields is the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA (often referred to as Superfund). This law requires EPA to focus its attention on cleaning up the nation's most toxic waste sites in order to protect human health and the environment.

Under CERCLA, the current owner of a contaminated facility may be held liable and responsible for the cost of cleanup. Although potential liability is a valid and serious concern for landowners, it is important to keep this concern within context. For example, the General Accounting Office

The Local Nature of Reuse Projects

By its very nature, property reuse is a local activity. Parties with the greatest stake in the economic and environmental benefits of a reuse project are the owner(s), surrounding property owners, local citizens, developer(s), local government, and state government. Because of their stake in the project, these parties are generally in the best position to plan, implement, and oversee required cleanup and reuse activities.

EPA believes that there are many issues that affect property reuse; federal environmental liability is only one. After a party has a clear understanding of its federal environmental liability risks and the ways it can minimize them, that party may work primarily or exclusively with state government, local government, and community interests in addressing non-federal issues and planning and implementing its reuse project.

(GAO) estimates the number of potential brownfields at 450,000 sites. Approximately 10% of brownfields are considered for the National Priorities List with less than 1% actually placed. Therefore, at least 99% of potential brownfields across the country will not require federal Superfund action. **Although the existence and applicability of federal environmental laws and regulations could have an impact on development, the reality is that federal action has been taken at a relatively small number of these parcels.**

The relatively small number of sites on the National Priorities List is just one fact illustrating that the federal environmental liability risks associated with brownfields are not nearly as large as one might imagine. Even for risks that could be significant, both Congress and EPA have developed tools that can help parties minimize and manage their risks. This handbook summarizes those tools.

Purpose and Use of This Handbook

This handbook provides background information on CERCLA and summarizes various statutory provisions and agency regulations, policies, and guidance documents that can be used as tools to manage CERCLA liability risks

Helpful Web Sites

The following Web sites contain additional information about issues addressed in this handbook:

- Office of Site Remediation Enforcement: www.epa.gov/oeca/osre
- Office of Emergency and Remedial Response: www.epa.gov/oswer/oerr
- Brownfields: www.epa.gov/brownfields
- Superfund: www.epa.gov/superfund
- Federal Register: www.nara.gov/fedreg
- Code of Federal Regulations: www.access.gpo.gov/nara/cfr
- U.S. Code: www.law.house.gov/usc

associated with brownfields and other sites. Designed for use by parties involved in the assessment, cleanup, and reuse of brownfields, this handbook provides a basic description of the purpose, applicability, and provisions of each tool. To gain a more complete understanding of any tool described in this handbook, refer to the relevant reference documents listed in Appendix A. Additional information on related topics can be found on EPA's internet web sites *(see box on page 3)*.

Before developing a previously used property, a party should collect and consider information about potential contamination at the property. The next step is to identify which level of government should be consulted regarding cleanup and liability protection, if needed. Most parties will find they can then proceed directly to redevelopment. Others may want to pursue private mechanisms such as indemnification or insurance *(see box)*. If the contamination

Private Tools

Although not addressed in this handbook, various private and state tools can be used to manage environmental liability risks associated with brownfields and other properties. These tools include the following:

- Indemnification Provisions-These are private contractual mechanisms in which one party promises to shield another from liability. Indemnification provisions provide prospective buyers, lenders, insurers, and developers with a means of assigning responsibility for cleanup costs, and encourage negotiations between private parties without government involvement.

- Environmental Insurance Policies-Under an environmental insurance policy, the insurer promises to compensate the insured party for liability related to environmental contamination of a particular property. Environmental insurance policies help private parties decrease the financial risk of getting involved in brownfields and other properties.

at the property warrants EPA's attention under CERCLA, the party should determine if EPA is taking or plans to take action at the property. After determining where the property fits in the federal or state cleanup pipeline, a party can use this handbook to determine which tool or tools are most appropriate for helping to manage the party's CERCLA liability risks.

Statutory and Regulatory Provisions

As a result of several well-publicized hazardous waste disposal disasters in the 1970's, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980. CERCLA, also known as Superfund, authorizes EPA to respond to environmental emergencies involving hazardous wastes or pollutants and contaminants, initiate investigations and cleanups, and take enforcement action against responsible parties. To provide money for these activities, CERCLA established a trust fund which is financed by taxes on the manufacture and import of chemicals and petroleum.

EPA's response authority may be exercised through removal actions or remedial actions. Removal actions are implemented when there is an immediate threat to human health and the environment. EPA has used removal actions to avert fires and explosions, prevent exposure to acute toxicity, and to protect drinking water supplies. Removal actions typically take less than twelve months to implement and cost less than two million dollars. Compared to removal actions, remedial actions may be longer-term and are usually more expensive cleanups.

CERCLA is designed to ensure that those who caused the pollution, rather than the general public, pay for the cleanup. In order to be held liable for the costs or performance of cleanup under CERCLA, a party must fall within one of the four categories found in CERCLA Section 107(a) and listed on the following page:

- Owner or operator of the facility at the time of disposal of hazardous substances;
- Current owner or operator of the facility;
- Person who generated or arranged for the disposal or treatment of hazardous substances; or
- Transporter of the hazardous substances, if this person selected the disposal or treatment site.

Using CERCLA, EPA has ensured the successful cleanup of many of the nation's worst hazardous waste sites. These cleanups have required the financing and participation of numerous Potentially Responsible Parties (PRPs). Many prospective purchasers, developers, and lenders have avoided getting involved with brownfield properties because they fear that they too might be held liable under CERCLA someday. As stated earlier, the vast majority of brownfield properties will never require EPA's attention under CERCLA or any other federal law. Accordingly, parties' fears of potential liability, rather than their actual incurrence of liability, are the primary obstacles to the redevelopment and reuse of brownfields. EPA hopes that the remaining sections of this handbook will assist in eliminating or reducing fears.

Because CERCLA is a statutory law enacted by Congress, it is binding in all legal actions brought under CERCLA, whether those actions are brought by EPA or in a private party lawsuit. Similarly, CERCLA regulations issued by EPA are binding in all CERCLA actions. As a result, CERCLA liability protections written into statute or regulation provide extremely valuable means for managing CERCLA liability risks.

CERCLA's Liability Scheme

Under CERCLA, liability for cleanup is strict, joint, and several, as well as retroactive. The implications of these features are as follows:

- Strict–A party can be held liable even if it did not act negligently or in bad faith.
- Joint and several-If two or more parties are responsible for the contamination at a site and unless a party can show that the injury or harm at the site is divisible, any one or more of the parties can be held liable for the entire cost of the cleanup.
- Retroactive-A party can be held liable even if the hazardous substance disposal occurred before CERCLA was enacted in 1980.

Third-Party and Innocent Landowner Defenses

Description

CERCLA Section 107(b) establishes defenses to cleanup liability. One of these defenses, the "third-party" defense, may be useful in brownfields situations. In certain circumstances, a landowner is not liable under CERCLA for site contamination resulting from acts committed by a third party who is neither an employee nor an agent of the land-owner. In order for this defense to apply, the third party's act must not have occurred in connection with a direct or indirect contractual relationship with the land owner.

In 1986, Congress amended CERCLA Section 107(b) and 101(35), restricting the definition of "contractual relationship" to protect people who acquired real property after hazardous waste was disposed there and who "did not know and had no reason to know" that the property was contaminated. This is often referred to as the "innocent landowner defense" even though it is actually a version of the third-party defense.

To assert a third-party defense, an innocent landowner must show that he took adequate precautions against the third party's acts and that he exercised "due care" with regard to the hazardous substances involved. In other words, the landowner must show that he did not "invite" the third party's actions through negligence or make their consequences worse after they occurred. There are additional evaluation criteria for asserting the "innocent landowner" version of the third-party defense *(see box)*.

Other Considerations

It is fairly difficult for a landowner to establish that he did not know and had no reason to know that hazardous substances were present on his property. A landowner must establish that at the time of purchase he made "all appropriate inquiry" into the property's previous ownership and use. In assessing the inquiry's "appropriateness," the courts take into account any specialized knowledge or experience of the landowner, the relationship of the purchase

Evaluation Criteria

In addition to satisfying the "precautions" and "due care" requirements, one of the following must be demonstrated:

- The landowner did not know and had no reason to know that the property was contaminated with hazardous substances when he acquired it;
- The landowner is a governmental entity that acquired the property through involuntary transfer or eminent domain authority; or
- The landowner acquired the property by inheritance or will.

The "innocent landowner" defense CANNOT be asserted in any of the following circumstances:

- A landowner disposes of a hazardous substance on property that is already contaminated, even if he were unaware of the earlier contamination;

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Evaluation Criteria (continued)

- A landowner learns of contamination on their property and sells it without informing the purchaser; or
- A landowner contributes to a release of a hazardous substance on his property.

price to the property's value if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence of contamination, and the ability to detect such contamination by appropriate inspection.

If contaminants are subsequently found on the property, their very presence may cast doubt on the appropriateness of the inquiry. Landowners have not always succeeded in convincing courts that unsuccessful inquiries were "appropriate."

A party with an innocent landowner defense may request a *de minimis* landowner settlement with EPA (*see page 39).*

Secured Creditor Exemption

Description

CERCLA Section 101(20)(A) contains a secured creditor exemption which eliminates owner/operator liability for lenders who hold indicia of ownership in a CERCLA facility primarily to protect their security interest in that facility, provided they do not participate in the management of the facility.

Before 1996, CERCLA did not define the key terms used in this provision. As a result, lenders often hesitated to loan money to owners and developers of contaminated property for fear of exposing themselves to potential CERCLA liability. In 1992, EPA issued the "CERCLA Lender Liability Rule" to clarify the secured creditor exemption. After the Rule was invalidated by a court in 1994, Congress incorporated many sections of the Rule into the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996. That Act amended CERCLA's secured creditor exemption to greatly clarify the situations in which lenders will and will not be protected from CERCLA liability. The amended exemption appears at CERCLA Section 101(20)(E)-(G).

"Participation in Management" Defined

A lender "participates in management" (and will not qualify for the exemption) if it:

- Exercises decision-making control over environmental compliance related to the facility, and in doing so, undertakes responsibility for hazardous substance handling or disposal practices; or
- Exercises control at a level similar to that of a manager of the facility, and in doing so, assumes or manifests responsibility with respect to

  (1) Day-to-day decision-making on environmental compliance, or

  (2) All, or substantially all, of the operational (as opposed to financial or administrative) functions of the facility other than environmental compliance.

The term "participate in management" does not include certain activities such as:

- Inspecting the facility;
- Requiring a response action or other lawful means to address a release or threatened release;
- Conducting a response action under CERCLA Section 107(d)(1) or under the direction of an on-scene coordinator;
- Providing financial or other advice in an effort to prevent or cure default; and
- Restructuring or renegotiating the terms of the security interest;

provided the actions do not rise to the level of participating in management.

After foreclosure, a lender who did not participate in management prior to foreclosure is not an "owner or operator" if it:

- Sells, releases (in the case of a lease finance transaction), or liquidates the facility.

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"Participation in Management" Defined (continued)

- Maintains business activities or winds up operations;
- Undertakes a response action under CERCLA Section 107(d)(1) or under the direction of an on-scene coordinator; or
- Takes any other measure to preserve, protect, or prepare the facility for sale or disposition;

provided the lender seeks to divest itself of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms. EPA considers this test to be met if the lender, within 12 months after foreclosure, lists the property with a broker or advertises it for sale in an appropriate publication.

Other Considerations

The 1996 amendment also protects lenders from contribution actions and government enforcement actions. Regardless of CERCLA's secured creditor exemption from owner/operator liability, a lender may be liable under CERCLA as a generator or transporter if it meets the requirements outlined in CERCLA Section 107 (a)(3) or (4). In June 1997, EPA issued a lender policy which further clarifies the liability of lenders under CERCLA *(see page 31)*.

Limitation of Fiduciary Liability

Description

A "fiduciary" is a person who acts for the benefit of another party. Common examples include trustees, executors, and administrators. CERCLA Section 107(n), added by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, protects fiduciaries from personal liability in certain situations, provides a liability limit for those fiduciaries who are found liable, and describes situations in which fiduciaries will and will not receive this statutory protection. CERCLA's fiduciary provision, however, does not protect the assets of the trust or estate administered by the fiduciary.

Fiduciary Liability:

For actions taken in a fiduciary capacity, liability under any CERCLA provision is limited to assets held in the fiduciary capacity. A fiduciary will not be liable in its personal capacity for certain actions such as:

- Undertaking or requiring another person to undertake any lawful means of addressing a hazardous substance;
- Enforcing environmental compliance terms of the fiduciary agreement; or
- Administering a facility that was contaminated before the fiduciary relationship began.

The liability limitation and "safe harbor" described above do not limit the liability of a fiduciary whose negligence causes or contributes to a release or threatened release.

The term "fiduciary" means a person acting for the benefit of another party as a bona fide trustee, executor, or administrator, among other things. It does not include a person who:

- Acts as a fiduciary with respect to a for-profit trust or other for-profit fiduciary estate, unless the trust or estate was created:
  - Because of the incapacity of a natural person, or
  - As part of, or to facilitate, an estate plan.
- Acquires ownership or control of a facility for the objective purpose of avoiding liability of that person or another person.

Nothing in the fiduciary subsection applies to a person who:

- Acting in a beneficiary or non-fiduciary capacity, directly or indirectly benefits from the trust or fiduciary relationship; or
- Is a beneficiary and fiduciary with respect to the same fiduciary estate and, as a fiduciary, receives benefits exceeding customary or reasonable compensation.

Protection of Government Entities That Acquire Property Involuntarily

Description

CERCLA Sections 101(20)(D) and 101(35)(A) protect federal, state, and local government entities from owner/operator liability if they involuntarily acquire contaminated property while performing their governmental duties. If a unit of state or local government makes an involuntary acquisition, it is exempt from owner/operator liability under CERCLA. Additionally, a state, local, or federal government entity that makes an involuntary acquisition will have a third-party defense to owner/operator liability under CERCLA if:

- The contamination occurred before the government entity acquired the property;
- The government entity exercised due care with respect to the contamination (*e.g.*, did not cause, contribute to, or exacerbate the contamination); and
- The government entity took precautions against certain acts of the party that caused the contamination and against the consequences of those acts.

Regulations set forth at 40 CFR 300.1105, and validated by the 1996 Asset Conservation, Lender Liability, and Deposit Insurance Protection Act, provide some examples of involuntary acquisitions.

As the examples below indicate, a government entity need not be completely passive in order to acquire property involuntarily. Often government entities must take some sort of discretionary, volitional action before they can acquire property following circumstances such as abandonment, bankruptcy, or tax delinquency. In these cases, the "involuntary" status of the acquisition is not jeopardized.

Other Considerations

A government entity will not have a CERCLA liability exemption or defense if it has

Acceptable Involuntary Acquisitions

EPA considers an acquisition to be "involuntary" if the government's interest in, and ultimate ownership of, the property exists only because the conduct of a non-governmental party gives rise to the government's legal right to control or take title to the property.

Involuntary acquisitions by government entities include the following:

- Acquisitions made by a government entity functioning as a sovereign (such as acquisitions following abandonment or tax delinquency);
- Acquisitions made by a government entity acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority (such as acquisitions of the security interests or properties of failed private lending or depository institutions);
- Acquisitions by a government entity through foreclosure and its equivalents while administering a governmental loan, loan guarantee, or loan insurance program; and
- Acquisitions by a government entity pursuant to seizure or forfeiture authority.

caused or contributed to the release or threatened release of contamination. As a result, acquiring property involuntarily does not unconditionally or permanently insulate a government entity from CERCLA liability. Furthermore, the liability exemption and defense described above do not shield government entities from liability as generators or transporters of hazardous substances under CERCLA Section 107(a)(3) or (4).

In June 1997, EPA issued a policy which further clarifies the CERCLA liability of government entities that involuntarily acquire property *(see page 31)*.

De Minimis Waste Contributor Settlements

Description

At a CERCLA site, some parties may have contributed only minimal amounts of hazardous substances compared to the amounts contributed by other parties. Under CERCLA Section 122(g), these contributors of small amounts may enter into *de minimis* waste contributor settlements with EPA. Such a settlement provides the waste contributor with a covenant not to sue and contribution protection from the United States. As a result, the settling party is protected from legal actions brought by EPA or other parties at the site. In exchange for the settlement, the *de minimis* party agrees to provide funds, based on its share of total waste contribution, toward cleanup, or to undertake some of the actual work.

EPA Policies and Guidance

Issuing a policy or guidance document is the strongest statement that EPA can make, short of issuing regulations, regarding the circumstances in which EPA may bring a CERCLA enforcement action against a particular type of party. Although the courts are not bound by EPA's administrative policies or guidance documents, they have recognized EPA's technical expertise and have generally ruled in agreement with EPA's opinions and interpretations of the laws it implements.

When a site, circumstance, or party falls within the defined criteria of an EPA policy or guidance document, individuals should find satisfaction in the fact that EPA will act in a manner consistent with that policy. In many cases, EPA's statement of policy not to pursue a particular type of party will provide adequate protection and comfort to an eligible party who will not need to seek additional documentation from EPA. In other cases, the potential for liability may motivate a party either to enter into an agreement with EPA that provides protection from CERCLA actions brought by EPA or other parties, or to seek written comfort from EPA.

The policy and guidance documents summarized in this section describe all three of these avenues for managing CERCLA liability risks. Because the documents focus on issues at non-federally-owned properties, parties interested in property currently or formerly owned by the federal government should consult the relevant documents listed in Appendix A.

Policy Towards Owners of Residential Property at Superfund Sites

Description

July 3, 1991

Owners of residential property located on a CERCLA site have raised concerns that they would be responsible for performance of a response action or payment of cleanup costs because they came within the definition of "owner" under CERCLA. Additionally, the owners were concerned that they might be unable to sell their properties given the uncertainty of EPA taking action against them. EPA issued its policy toward residential property owners to clarify when it would not require these owners to perform or pay for cleanup. The policy states that EPA, in the exercise of its enforcement discretion, will not take enforcement actions against an owner of residential property unless his activities lead to a release or threat of release of hazardous substances, resulting in the taking of a response action at the site.

In addition to applying to owners, EPA's policy applies to lessees of residential property whose activities are consistent with the policy. The policy also applies to persons who acquire residential property through purchase, foreclosure, gift, inheritance or other form of acquisition, as long as those persons' activities after acquisition are consistent with the policy.

Other Considerations:

With respect to EPA's exercise of enforcement discretion under this policy, it is irrelevant whether an owner of residential property has or had knowledge or reason to believe that contamination was present on the site at the time of purchase or sale of the residential property.

Threshold Criteria

An owner of residential property located on a CERCLA site is protected if the owner:

- Has not and does not engage in activities that lead to a release or threat of release of hazardous substances, resulting in the taking of a response action at the site;
- Cooperates fully with EPA by providing access and information when requested and does not interfere with the activities either EPA or a state are taking to implement a CERCLA response action;
- Does not improve the property in a manner inconsistent with residential use; and
- Complies with institutional controls (*e.g.*, property use restrictions) that may be placed on the residential property as part of the Agency's response action.

For further information contact:
Lori Boughton - (202) 564-5106
The Office of Site Remediation Enforcement

Policy Towards Owners of Property Containing Contaminated Aquifers

Description

July 3, 1995

The contaminated aquifer policy addresses the CERCLA liability of owners of property that contain an aquifer contaminated by a source or sources outside their property. These owners were concerned that EPA would hold them responsible for cleanup under CERCLA even though they did not cause and could not have prevented the groundwater contamination.

The policy states that EPA, in an exercise of its enforcement discretion, will not take an action under CERCLA to require cleanup or the payment of cleanup costs provided that the landowner did not cause or contribute to the contamination.

Threshold Criteria:

A landowner is protected by this policy if *all* of the following criteria are met:

- The hazardous substances contained in the aquifer are present solely as the result of subsurface migration from a source or sources outside the landowner's property;
- The landowner did not cause, contribute to, or make the contamination worse through any act or omission on their part;
- The person responsible for contaminating the aquifer is not an agent or employee of the landowner, and was not in a direct or indirect contractual relationship with the landowner (exclusive of conveyance of title); and
- The landowner is not considered a liable party under CERCLA for any other reason such as contributing to the contamination as a generator or transporter.

This policy may not apply in cases where:

- The property contains a groundwater well which may influence the migration of contamination in the affected aquifer*;* or
- The landowner acquires the property, directly or indirectly, from a person who caused the original release.

Other Considerations

If a third party who caused or contributed to the contamination sues or threatens to sue, EPA may consider entering into a *de minimis* landowner settlement with parties protected by this policy *(see page 39).*

For further information contact:

Elisabeth Freed - (202) 564-5117

The Office of Site Remediation Enforcement

Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities

Description

June 30, 1997

The lender liability policy clarifies the circumstances in which EPA intends to apply as guidance the provisions of the 1992 CERCLA Lender Liability Rule ("Rule") and its preamble in interpreting CERCLA's lender and involuntary acquisition provisions. The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 amended these CERCLA provisions and generally followed the approach of the Rule. EPA's subsequent lender policy explains that when interpreting the amended secured creditor exemption, EPA will treat the Rule and its preamble as authoritative guidance. For example, the amendments do not clarify the steps that a lender can take after foreclosure and still remain exempt

Example:

After foreclosure, a lender who did not "participate in management" prior to foreclosure can generally:

- Maintain business activities;
- Wind up operations; and
- Take actions to preserve, protect, or prepare the property for sale

provided that the lender attempts to sell, re-lease property held pursuant to a lease financing transaction, or otherwise divest itself of the property in a reasonably expeditious manner using commercially reasonable means. This test will generally be met if the lender, within 12 months of foreclosure, lists the property with a broker or advertises it for sale in an appropriate publication.

from owner/operator liability. In making liability determinations, EPA, following its policy, will defer to the Rule (*see box*).

The 1996 amendment also validates the portion of the Rule that addresses involuntary acquisitions by government entities. EPA's policy clarifies that similar to the preamble of any valid regulation, the preamble to the CERCLA Lender Liability Rule will be looked to as authoritative guidance on the meaning of the portion of the Rule addressing involuntary acquisitions.

For further information contact:

Lori Boughton - (202) 564-5106

The Office of Site Remediation Enforcement

Guidance on Settlements With Prospective Purchasers of Contaminated Property

Description

May 1995

Knowledge of contamination prior to purchase prevents a party from asserting the CERCLA "innocent landowner defense" after acquisition of a property. As a result, many prospective purchasers have avoided buying properties that are contaminated or merely perceived to be contaminated. To solve this problem at contaminated properties where EPA action has been, is currently, or may be taken, the agency may enter into administrative agreements with prospective purchasers who agree to provide a benefit to EPA. In return, the agreement provides a promise or covenant from the federal government not to sue the prospective purchaser for the costs of cleaning up the contamination that existed at the time of purchase.

Criteria

EPA may enter into a prospective purchaser agreement in situations where all of the following criteria can be met:

- EPA has undertaken, is undertaking, or plans to undertake, a response action;
- The agreement will result in either:
  - a substantial direct benefit to EPA in terms of cleanup or funds for cleanup; or
  - a lesser direct benefit to EPA coupled with a substantial indirect benefit to the community (such as the creation of jobs, preservation of green space, or infrastructure development);
- With the exercise of due care, the continued operation of the facility or new site development will not aggravate or contribute to the existing contamination or interfere with EPA's response action;
- The continued operation or new development of the property will not pose health risks to the community and those persons likely to be present at the site; and
- The prospective purchaser is financially viable.

Other Considerations

Prospective purchaser agreements may not be appropriate at sites where there are other means available to address CERCLA liability concerns (e.g., private mechanisms such as insurance or indemnification agreements) without EPA involvement, and at sites undergoing cleanup through a state program.

This guidance also applies to persons seeking prospectively to operate or lease contaminated property.

The model prospective purchaser agreement used by the agency can be found in Appendix C.

For further information contact:

David Gordon (202) 564-5147
Helen Keplinger (202) 564-4221
The Office of Site Remediation Enforcement

Policy on the Issuance of EPA Comfort/Status Letters

Description

November 12, 1996

Some properties may remain unused or underutilized because potential property owners, developers, and lenders are unsure of the environmental status of these properties. By issuing comfort letters, EPA helps interested parties better understand the likelihood of EPA involvement at a potentially contaminated property. Although not intending to become involved in typical private real estate transactions, EPA is willing to provide a comfort letter when appropriate.

Comfort letters are intended to clarify the likelihood of EPA involvement at a site, or identify whether a party is protected by a statutory provision or discretionary enforcement policy. If EPA is not involved at the property, the party may be referred to the appropriate state agency for further

Evaluation Criteria

EPA may issue a comfort letter upon request if:

- The letter may facilitate cleanup and redevelopment of potentially contaminated property;
- There is the realistic perception or probability of incurring CERCLA liability; or
- There is no other mechanism available to adequately address the party's concerns.

information. EPA does not intend to become involved in typical private real estate transactions.

Comfort letters address a particular set of circumstances and provide whatever information is contained within EPA's databases. Questions typically addressed by comfort letters include:

- Is the site or property listed in CERCLIS?
- Has the site been archived from CERCLIS?
- Is the site or property contained within the defined boundaries of a CERCLIS site?
- Has the site or property been addressed by EPA and deleted from the defined site boundary?
- Is the site or property being addressed by a state voluntary cleanup program?
- Is EPA planning or currently performing a response action at the site?
- Are the conditions at the site or activities of the party addressed by a statutory provision or EPA policy?
- Is the site in CERCLIS but designated as a state-lead or deferred to the state agency for cleanup?

The agency uses four **sample** comfort letters to respond to requests. The samples can be found in Appendix D.

For further information contact:

Elisabeth Freed - (202) 564-5117

The Office of Site Remediation Enforcement

Interim Approaches for Regional Relations with State Voluntary Cleanup Programs

Description

November 14, 1996

State and local empowerment to clean up sites is at the center of EPA's Brownfields Initiative. Many states have developed voluntary cleanup programs that are designed to streamline protective cleanups of sites that are not on the National Priorities List and other sites not of federal interest.

EPA regional offices have developed partnerships with states with voluntary cleanup programs through the negotiation of Memoranda of Agreement (MOA). During the negotiation of an agreement, EPA and the interested state address state capabilities, programmatic areas, and the types of sites to be included.

EPA's guidance is intended to facilitate regional/state MOA negotiations. The MOA delineates the roles and responsibilities between a state and EPA with respect to sites being cleaned up under the state's voluntary cleanup programs. This interim guidance sets out six baseline criteria which are evaluated before a region enters into an MOA with a state voluntary cleanup

program. Through the signed and completed MOA, EPA acknowledges the adequacy of the state voluntary cleanup program. EPA also agrees that for sites addressed under the MOA, EPA does not plan or anticipate taking a removal or remedial action at sites involved in the voluntary cleanup program, unless EPA determines that there may be an imminent and substantial danger to public health or welfare or the environment.

Program Evaluation Criteria

EPA may enter into an MOA addressing a state voluntary cleanup program that meets all of the following baseline criteria:

- Provides opportunities for meaningful community involvement.
- Ensures that voluntary *response actions* are protective of human health and the environment.
- Has adequate resources to ensure that voluntary *response actions* are conducted in an appropriate and timely manner, and that both technical assistance and streamlined procedures where appropriate, are available from the State agency responsible for the Voluntary Cleanup Program.
- Provides mechanisms for the written approval of *response action* plans and a certification or similar documentation indicating that the response actions are complete.
- Provides adequate oversight to ensure that voluntary *response actions* are conducted in such a manner to assure protection of human health and the environment, as described above.
- Shows the capability, through enforcement or other authorities, of ensuring completion of *response actions* if the volunteering party (ies) conduction the response action fail(s) or refuse(s) to complete the necessary response action, including operation and maintenance or long-term monitoring activities if appropriate.

For further information contact:

Leslie Jones - (202) 564-5123.
The Office of Site Remediation Enforcement

Nancy Wilson - (202) 260-1910.
Outreach and Special Project Staff

Guidance on Landowner Liability Section 107(a)(1) of CERCLA, *de minimis* Landowner Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property

Description

June 16, 1989

In the event of a release or threatened release of a hazardous substance, owners of property where such a substance has been "deposited, stored, disposed of, or placed, or otherwise come to be located" are liable for the costs of cleaning up the release. Under Section 107(b)(3), liability extends to releases caused by a third party "in connection with a contractual relationship, existing directly or indirectly" with the owner. To address concerns that liability could be unfairly assigned to landowners who had not been involved in hazardous substance disposal activities, EPA issued its policy on de minimis landowner

settlements. (This policy also includes a section on settlements with prospective purchasers that was superseded by the May 1995 *Guidance on Settlements with Prospective Purchasers of Contaminated Property*). The policy states that the Agency will make an effort to determine in the early stages of a case whether a landowner satisfies the elements (see box) necessary to establish a third party defense under Section 107(b)(3) of CERCLA. If the Agency determines the landowner meets the elements, the Agency may negotiate a *de minimis* settlement under Section 122(g)(1)(B) of CERCLA. The settlement provides the landowner with a covenant or promise that EPA will not sue the landowner for the costs of cleaning up existing contamination, as well a protection from contribution actions brought by other parties. In exchange, EPA may require the landowner to provide, at a minimum, access and cooperate with any cleanup activities on their property.

Elements of Defense

1. Did the landowner acquire the property without knowledge or reason to know of the disposal of hazardous substances?
2. Did governmental landowners acquire the property involuntarily or through eminent domain proceedings?
3. Did the landowner acquire the property by inheritance or bequest without knowledge?
4. Was the property contaminated by third parties outside the chain of title?

Other Considerations:

EPA may consider entering into de minimis landowner settlements with parties protected by the *Policy Towards Owners of Property Containing Contaminated Aquifers*.

For further information contact:

Helen Keplinger
(202) 564-4221
Office of Site Remediation Enforcement

Revised Guidance on CERCLA Settlements with De Micromis Waste Contributors

Description

June 3, 1996

EPA provides enhanced protection for a subset of *de minimis* waste contributors referred to as "de micromis". De micromis settlements may be available to parties who generated or transported a minuscule amount of waste to a Superfund site, an amount less than the minimal amount normally contributed by the *de minimis* parties. EPA's revised guidance defines eligible de micromis parties with volumetric cut-offs (*see box*). As a matter of policy, EPA does not pursue de micromis waste contributors for the costs of cleaning up a site. If, however, a de micromis party is threatened with litigation by other parties at the site for the costs of cleanup, EPA will enter into a zero dollar settlement with the de micromis party. De micromis settlements provide both a covenant not to sue from the Agency and contribution protection against other parties at the site.

Eligibility for a de micromis settlement

EPA's policy is to not pursue a party if their waste contribution at a site is:

- Equal or less than either (1) 0.002% of the total hazardous waste volume, or (2) 110 gallons (e.g., two 55 gallon drums) or 200 pounds of material containing hazardous substances; or
- 0.2% of total volume where the party contributed only municipal solid waste.

For further information contact:

Myron Eng (202) 564-2276
Victoria Van Roden (202) 564-4268
Office of Site Remediation Enforcement

APPENDIX A

Related Policies and Guidance

In addition to issuing policy and guidance documents that provide tools for managing CERCLA liability risks, EPA has issued various policy and guidance documents that promote faster investigation, cleanup, and redevelopment of sites. Summarized below is just a small sampling of the many policy and guidance documents that may be helpful to parties interested in managing CERCLA liability risks at brownfields and other sites.

Copies of the policy and guidance documents can be obtained from the Superfund Hotline ((800) 424-9346), the Superfund Document Center ((703) 603-9232), or on EPA's web pages (see page 3). In some instances, copies may be ordered from the National Technical Information Service (NTIS). Documents may be ordered by either writing to

NTIS
5283 Port Royal Road
Springfield, VA 22161

or calling (800) 553-NTIS.

Reference List

Background

CERCLA Orientation Manual

October 1992

The CERCLA Orientation Manual serves as a program orientation guide and reference document to the Comprehensive Environmental Response, Compensation, and Liability Act. The purpose of the manual is to assist EPA and state personnel involved with hazardous waste remediation, emergency response, and chemical and emergency preparedness. The organizational and operational components of the Superfund program also are described.

To order a hard copy:

National Center for Environmental Publications and Information
P.O. Box 42419
Cincinnati, OH 45242-2419
(513) 489-8190
order number: EPA542R92005

National Contingency Plan (40 C.F.R. Part 300)

The National Oil and Hazardous Substances Pollution Contingency Plan, more commonly called the National Contingency Plan (NCP), establishes a comprehensive process by which the federal government responds to both oil spills and hazardous substances. The NCP coordinates response efforts such as accident reporting, spill containment, cleanup, and personnel contacts.

Rules of Thumb for Superfund Remedy Selection

October 2, 1995

This document briefly summarizes key elements of various remedy selection guidance documents and policies, and describes the three major policy areas of remedy selection: 1) risk assessment and risk management; 2) development of remedial alternatives; and 3) groundwater response action.

Process

This Is Superfund - A Citizen's Guide to EPA's Superfund Program

"This is Superfund" introduces basic issues regarding the Superfund program. Topics addressed include how Superfund sites are discovered, and who pays for and is involved in cleanups. Key terms for understanding the Superfund program, such as potentially responsible party and National Priorities List are defined.

For more information on Superfund:

Call 1-800-424-9346
or
Contact the nearest EPA Regional Office.

Community Reinvestment Act (CRA)

In 1997 Congress enacted the Community Reinvestment Act requiring lenders to make capital available in low- and moderate-income urban neighborhoods, thereby giving rise to concerns over potential environmental and financial liability for cleanups at sites by lenders, developers, and property owners. The Community Reinvestment Act establishes creative initiatives for economic development while easing fears of financial liability and regulatory burdens.

For further information:

Outreach and Special Projects Staff
(202) 260-6285

Partial Deletion of Sites Listed on the National Priorities List

November 1, 1995

EPA deletes sites from the National Priorities List with state concurrence when no further cleanup response is warranted under CERCLA. Historically, only entire sites could be deleted from the National Priorities List. Under this policy, parties may submit petitions for partial deletions to EPA. Additionally, the policy gives EPA regional offices the flexibility to clarify which areas

of National Priorities List sites are considered uncontaminated due to the completion of proper investigation or cleanup actions.

Before a portion of a site can be considered for partial deletion from the National Priorities List, it must meet the same deletion criteria that an entire site must meet. (See 40 *CFR* Part 300.425).

For further information:

Hugo Paul Fleischman
Office of Emergency and Remedial Response
(703) 603-8769

Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions

May 3, 1995

The deferral guidance provides a framework for Regions, states, and tribes to determine the most appropriate, effective, and efficient means to address response at sites. Implementation is to be flexible so as to account for the different capabilities of these acting parties.

For further information:

Steve Caldwell
Office of Emergency and Remedial Response
(703) 603-8850
or
Murray Newton
Office of Emergency and Remedial Response
(703) 603-8840

The National Priorities List for Uncontrolled Hazardous Waste Sites; Listing and Deletion Policy for Federal Facilities

November 24, 1997

This document establishes an interim final revision to the Agency's policy on placing federal facility sites on the National Priorities List. The interim final policy revisions apply to federal facility sites that are RCRA-regulated facilities engaged in treatment, storage, or disposal of hazardous waste.

For further information:

Hugh Davis
Office of Solid Waste
(703) 308-8633

Policy Towards Landowners and Transferees of Federal Facilities

June 13, 1997

This policy was created to address the potential liability concerns of non-federal parties who acquire federal facility property. Such acquisitions have become increasingly common with the reduction in size and number of federal facilities such as military bases. The intent of this policy is to alleviate uncertainty regarding potential enforcement action by the EPA against landowners and transferees (*i.e.,* lessees) of federal facility properties.

For further information:

Seth Lowe
Federal Facilities Restoration and Reuse Office
(202) 260-8692

Bill Frank
Federal Facilities Enforcement Office
(202) 564-2584

EPA Guidance on the Transfer of Federal Property by Deed Before All Necessary Remedial Action Has Been Taken Pursuant to CERCLA Section 120(h)(3).

June 16, 1998

This guidance, referred to as the "Early Transfer Guidance," describes EPA's process in determining a federally-owned property's suitability for transfer to a private party prior to the completion of all necessary cleanup action Concurrence of a state's Governor is required.

For further information:

Federal Facilities Restoration and Reuse Office
(202) 260-9924

Technical

Road Map to Understanding Innovative Technology Options for Brownfields Investigation and Cleanup

June 1997

The Road Map identifies

potential technology options available at each of the basic phases involved in the characterization and cleanup of brownfields sites: site assessment, site investigation, cleanup options, and cleanup design and implementation. The Road Map is not a guidance document. Rather, each section describes the steps involved in the characterization and cleanup of brownfields sites and connects those steps with available technology options and supporting technology information resources. Appendices in the Road Map include a list of common contaminants found at typical brownfields sites, a detailed guide to common environmental terms and acronyms, and a list of state and EPA brownfields contacts.

For further information:

Dan Powell
Technology Innovation Office
(703) 603-9135

To order a hard copy:

For government parties:

National Center for Environmental Publications and Information (NCEPI)
U.S. Environmental Protection Agency
P.O. Box 42419
Cincinati, OH 45242
Telephone: (513) 489-8190
refer to document number: EPA 542-B-97-002

Tool Kit of Information Resources for Brownfields Investigation and Cleanup

June 1997

The Tool Kit provides abstracts and access information for a variety of relevant resources, including electronic databases and bulletin boards, newsletters, regulatory and policy guidance, and technical reports. The Tool Kit describes the resources identified in the Road Map, explains how to obtain the publications, and provides a "starter kit" of important information resources to help brownfield stakeholders understand available technology.

For further information:

Dan Powell
Technology Innovation Office
(703) 603-9135

To order a hard copy:

For government parties:

National Center for Environmental Publications and Information (NCEPI)
U.S. Environmental Protection Agency
P.O. Box 42419
Cincinnati, OH 45242
Telephone: (513) 489-8190
refer to document number: EPA 542-B-97-001

Soil Screening Guidance: Fact Sheet

May 17, 1996

EPA's Soil Screening Guidance helps standardize and accelerate the evaluation and cleanup of contaminated soils at National Priorities List sites where future residential land use is anticipated. To help identify areas at sites on the National Priorities List that need further investigation or that can be screened out from further consideration, the guidance provides a step-by-step methodology for determining levels of soil contamination. The Soil Screeening Guidance can help speed up the investigation and cleanup of contaminated sites, save time and money and make sites available for redevelopment more quickly.

Documents related to the guidance include the Soil Screening Guidance User's Guide, Fact Sheet, and Technical Background Document.

For further information:

David Cooper
Office of Emergency and Remedial Response
(703) 603-9034

Land Use in the CERCLA Remedy Selection Process

May 1995

EPA's land use directive promotes early discussions with

local land use planning authorities, local officials, and the public regarding reasonably anticipated future uses of the property on which a National Priorities List site is located. The directive also encourages the use of realistic assumptions regarding future land use in the baseline risk assessment the development of remedial alternatives, and the CERCLA remedy selection process.

For further information:

Sherri Clark
Office of Emergency and Remedial Response
(703) 603-9043

Presumptive Remedies: Policy and Procedures

September 1993

Presumptive remedies are preferred technologies to be used for cleanups at common categories of sites.

EPA's presumptive remedies limit the number of technologies considered for cleanup at similar sites and result in streamlined site assessments, remedy designs, and accelerated remedy selection decisions which save time and money. Presumptive remedies also promote consistency in remedy design and selection, and improve the predictability of the remedy selection process for communities and potentially responsible parties.

For further information:

Andrea McLaughlin
Office of Emergency and Remedial Response
(703) 603-8793

Presumptive Remedy for CERCLA Municipal Landfill Sites

September 1993

This fact sheet establishes containment as the presumptive remedy for CERCLA municipal landfill sites. It also addresses certain streamlining principles related to the planning of remedial investigations/ feasibility studies and provides guidance on the level of detail appropriate for risk assessment

Presumptive Response Strategy and Ex-Situ Treatment Technologies for Contaminated Groundwater at CERCLA Sites

October 1996

This guidance addresses the importance of using site-specific remedial objectives as the focus of the remedy selection process for contaminated groundwater. Topics addressed include presumptive response strategy for all sites with contaminated groundwater, presumptive technologies for treatment of extracted groundwater, and selection of technologies for the ex-situ treatment component of groundwater remedy.

For further information:

Scott Fredericks
Office of Emergency and Remedial Response
(703) 603-8771

Presumptive Remedies: Site Characterization and Technology Selection for CERCLA Sites with Volatile Organic Compounds in Soil

January 19, 1993

This fact sheet outlines the presumptive remedies for soils contaminated by volatile organic compounds at CERCLA sites. Charts and matrices are included to explain and compare the various technologies.

For further information:

Scott Fredericks
Office of Emergency and Remedial Response
(703) 603-8771

Settlement

Methodology for Early* De Minimis *Waste Contributor Settlements under CERCLA Section 122(g)(1)(A)

June 2, 1992

Under CERCLA section 122(g)(1)(A), EPA is authorized to enter into settlements with minor waste contributors (*de minimis* parties) of a site when practicable and in the public interest. This policy provides guidance for early consideration and proposals of such *de minimis* settlements, including the methodology to

facilitate settlement, and procedures for identifying early de minimis candidates. For further information:

Gary Worthman
Office of Site Remediation Enforcement
(202) 564-4292

Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites

February 5, 1998

This policy supplements the Interim Policy on CERCLA Settlements Involving Municipalities and Municipal Waste issued September 30, 1989. Under this policy, EPA continues the practice of generally not identifying generators and transporters of municipal solid waste as potentially responsible parties at National Priorities List sites. The policy identifies a settlement methodology for making settlements to MSW generators and transporters seeking to resolve liability. It also identifies a presumptive settlement range for municipal owners and operators of co-disposal sites on the National Priorities List seeking to settle their Superfund liability.

For further information:

Leslie Jones
Office of Site Remediation Enforcement
(202) 564-5123
or
Doug Dixon
Office of Site Remediation Enforcement
(202) 564-4232

General Policy on Ability to Pay Determinations

September 30, 1997

This policy document explains what is necessary for an acceptable ability to pay (ATP) settlement in Superfund cases, and addresses general issues applicable to both the ATP process and ATP settlements. The guidance sets an "Undue financial hardship" standard and describes a two-part analysis for determining an acceptable ATP settlement amount are addressed.

For further information:

Robert Kenney
Office of Site Remediation Enforcement
(202) 564-5127

Fact Sheet: Revised De Micromis Guidance

June 4, 1996

This fact sheet describes EPA's efforts in reducing transaction costs for very small volume contributors (de micromis parties). It outlines cut-off ranges to be considered in assessing a party's waste contribution and also discusses additional reference documents which may be of interest to parties who contributed very small amounts of waste to hazardous waste sites.

For further information:

Myron Eng
Office of Site Remediation Enforcement
(202) 564-2276

Janice Linett
Office of Site Remediation Enforcement
(202) 564-5131

Streamlined Approach for Settlements With De Minimis *Waste Contributors under CERCLA Section 122(g)(1)(A)*

June 30, 1993

This guidance encourages EPA Regional offices to take a more active role in facilitating *de minimis* settlements by establishing minimum levels of information necessary before considering a *de minimis* settlement, and providing a methodology for payment.

For further information:

Gary Worthman
Office of Site Remediation Enforcement
(202) 564-4292

APPENDIX B

United States
Environmental Protection
Agency

Office of
Site Remediation
Enforcement (2273G)

May 1995

EPA Overview of Ability To Pay Guidance And Models

The purpose of this document is to identify and briefly describe documents that are relevant to Superfund ability to pay ("ATP") analyses. The documents fall into two general categories: (1) documents that require or provide for consideration of the ability to pay of potentially responsible parties ("PRPs"); and (2) documents that describe methods to determine ATP settlement amounts. The Regions should use documents in the first group in making Superfund ATP determinations. The Regions may also use documents in the second group in conducting ATP settlements until more specific Superfund ATP settlement guidance is provided by Headquarters. **[Note: Users should not rely solely on this summary document in making ability to pay determinations, but should instead read the relevant document(s) in their entirety.]**

A. GENERAL POLICY DOCUMENTS

The following Agency documents describe situations in which a liable party's ability to pay should be considered. Although some of these documents do not deal specifically with CERCLA liability, they represent general Agency policy regarding the use of ability to pay in enforcement cases. For this reason, the documents should be relied upon in situations relating to the ability to pay potential of Superfund PRPs.

1. General Civil Penalty Policy

The *General Civil Penalty Policy* is composed of two documents: *Policy on Civil Penalties* and *A Framework for Statute-Specific Approaches to Penalty Assessments*:

a. Policy on Civil Penalties
(EPA General Enforcement Policy # GM-21)
[February 16, 1984]

This is an Agency guidance document that "establishes a single set of goals for penalty assessment in EPA administrative and judicial enforcement actions." Although this document is intended to address penalty considerations, it is important because it sets forth the Agency's basic philosophy on ability to pay issues in enforcement cases.

This philosophy indicates that under the goal of fair and equitable treatment of the regulated community, the policy must allow for flexibility to adjust penalties. The policy lists certain factors that are to be considered in determining penalty amounts. One of these factors is "ability to pay." The policy also cautions that a reduction of a penalty based on ability to pay is only "appropriate to the extent the violator clearly demonstrates that it is entitled to mitigation."

b. A Framework for Statute-Specific Approaches to Penalty Assessments
(EPA General Enforcement Policy # GM-22)
[February 16, 1984]

A companion to the *Policy on Civil Penalties*, this policy directs EPA staff on the development of medium-specific penalty policies for administratively-imposed penalties and judicial and administrative settlements under statutes enforced by the Agency. It restates and amplifies some of the concepts included in the *Policy on Civil Penalties* document.

Lack of an ability to pay is identified as one circumstance of "compelling public concern" based on which an enforcement case may be settled for less than the economic benefit of noncompliance. This document states that ability to pay settlements are allowed if "[r]emoval of the economic benefit would result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business."

Three additional requirements are provided for use in ability to pay determinations: 1) the violator has the burden of demonstrating an inability to pay claim; 2) "EPA reserves the option, in appropriate circumstances, of seeking a penalty that might put a company out of business"; and 3) documenta-

tion of all ability to pay adjustments must be included in case files and other relevant internal documents.

2. Guidance on Determining a Violator's Ability to Pay a Civil Penalty (EPA General Enforcement Policy # GM-56) [December 16, 1986]

This Agency guidance document amplifies the discussion in the *General Civil Penalty Policy* relating to the use of the ability to pay factor in the imposition of civil penalties. This guidance document is directed toward civil penalties imposed on for-profit entities that have not filed for bankruptcy. It establishes a standard for the evaluation of an inability to pay claim by stating that "EPA may consider using the ability to pay factor to adjust a civil penalty when the assessment of a civil penalty may result in extreme financial hardship."

Although this document establishes a standard, it does not determine a specific dollar amount that a party can afford to pay. The guidance requires the examination of various options that a violator has for paying a civil penalty and provides that the Agency may request copies of tax returns and other financial documents to support claims of inability to pay. The document also states that if requested information is not provided, the Agency should seek the full penalty amount.

"ABEL," a computer program that evaluates the financial health of for-profit entities based on the estimated strength of their internally-generated cash flows, is introduced in this guidance. (A more detailed description of ABEL is provided below.) The document notes that, even if the ABEL analysis shows an inability to pay a penalty with internally generated cash flow, the Agency should evaluate other possible sources of payment.

3.* Interim CERCLA Settlement Policy (OSWER # 9835.0) [December 5, 1984]

This Agency guidance document identifies ten criteria governing private party settlements under CERCLA. One criterion is "ability of the settling parties to pay." This document states that "the settlement proposal should discuss the financial condition of that party, and the practical results of pursuing a party for more than the government can hope to actually recover."

4.* Guidance on Documenting Decisions Not to Take Cost Recovery Actions (OSWER # 9832.11) [July 7, 1988]

This document states that the decision to not take a cost recovery action may be based on the finding that a PRP is not financially viable or that it is unable to pay a substantial portion of the claim. This guidance references the *PRP Search Manual* (OSWER # 9834.6).

5.* Transmittal of the Superfund Cost Recovery Strategy (OSWER # 9832.13) [July 29, 1988]

The Superfund cost recovery strategy requires the Agency to consider the "financial ability of the potential defendants to satisfy a judgment for the amount of the claim or to pay a substantial portion of the claim" when deciding to issue a cost recovery referral.

6.* Submittal of Ten-Point Settlement Analysis for CERCLA Consent Decrees (OSWER # 9835.14) [August 11, 1989]

Commonly known as the "ten point guidance," this document makes the same reference to ability to pay considerations as the *Interim CERCLA Settlement Policy* document: that the "settlement proposal should discuss the financial condition of [a] party, and the practical results of pursuing a party for more than the government can hope to actually recover."

7.* Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes (OSWER # 9834.13) [December 6, 1989]

This Agency guidance document describes the Agency's interim policy for CERCLA settlements with municipalities. Included in the document is authority to include special settlement provisions "where a municipality has successfully demonstrated to EPA that they are appropriate (e.g., where valid ability to pay or procedural constraints that affect the timing of payment exist)."

8.* Final Penalty Policy for Sections 302, 303, 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Compensation and Liability Act (OSWER # 9841.2) [June 13, 1990]

This penalty policy allows for the reduction of a penalty that is "clearly beyond the financial means of the violator." It reiterates much of what is stated in earlier penalty policy documents, including the use of ABEL and the type of information that is to be relied upon in making an ability to pay determination.

B. DOCUMENTS THAT ASSIST IN DETERMINING ABILITY TO PAY AMOUNTS

The following documents identify methodologies that may be relied upon in conducting an ability to pay analysis. Although the documents which follow provide much useful information for determining an ability to pay amount, none of these documents represent formal Agency guidance directed specifically at Superfund cases.

1. The ABEL Computer Model and Supporting Documentation

The Agency has developed a computer model that assists in identifying whether a settlement amount has the potential to create a financial hardship. The computer program is known as ABEL and the following three documents, *ABEL User's Manual, ABEL User's Guide,* and *Supplement to the ABEL User's Manual: Superfund ABEL,* describe the use of, and methodologies relied upon in performing, an ABEL ability to pay analysis.

ABEL conducts an ability to pay assessment of a for-profit corporation. ABEL projects the ability of the for-profit corporation to pay for the proposed settlement from future earnings and from a delay in reinvestment of capital assets.

The ABEL model will calculate certain common financial ratios that describe the financial strengths and weaknesses of the for-profit corporation. This part of the analysis is called a phase one analysis and can be performed with a minimum of one year of financial information. ABEL requires at least three years of tax data to make a phase two projection. The phase two projection compares the proposed settlement amount with projected future cash flows of a for-profit corporation. The phase two projection then provides the statistical probability that the corporation can pay the proposed settlement from the projected future cash flows.

ABEL is designed to be used by those who are not familiar with financial information. The ABEL documentation informs enforcement personnel that a person experienced in ability to pay analysis must examine the financial information prior to the reduction of a proposed settlement amount if the ABEL analysis indicates an inability to pay.

ABEL is <u>not</u> designed to evaluate the ability to pay of other financial entities such as municipalities, partnerships or individuals.

a. ABEL User's Manual
[October 1991 Version]

This manual provides step-by-step instructions for using the ABEL model. The *ABEL User's Manual* describes how the ABEL model can be used in assessing a for-profit corporation's ability to pay one or more of the following expenditures: civil penalty; environmental clean-up costs; and/or pollution control equipment costs. The *User's Manual* also provides background information on key assumptions used in the model (e.g., reinvestment rate), and how these can be altered by the user.

b. ABEL User's Guide *[October 1991]*

This guide is available in two versions, an "uncut" version for government users of the ABEL model (which contains confidential information) and a non-confidential version for outside users of the model (which is now available for purchase through the National Technical Information Service (NTIS)).

The government version of this document provides internal enforcement guidance on how EPA staff can effectively use the ABEL computer model in settlement negotiations. Specifically, this document describes what additional analyses should be performed if ABEL predicts that a violator's cash flow will not be sufficient to pay proposed penalty and/or cleanup costs.

The *User's Guide* relies upon 3-5 years of federal income tax returns to perform the analysis and also describes other documents that should be requested from a violator, as well as public sources of information.

c. Supplement to the ABEL User's Manual: Superfund ABEL *[September 1992 Version]*

This supplement to the *ABEL User's Manual* provides information on use of the ABEL model for Superfund calculations. The Superfund ABEL model is easier to use when estimating the present value of costs associated with the work that is agreed to be performed. However, the standard values utilized by the Superfund ABEL model relax the criteria for determining a financial hardship. Accordingly, the Superfund ABEL model may identify more financial hardship situations than the standard ABEL model. If the conclusion reached

by the Superfund ABEL model is that the for-profit corporation has the ability to pay, the chances of the corporation demonstrating an extreme financial hardship are small.

2. Beyond ABEL: Ability to Pay Guidance [February 1993]

This guidance document is designed to assist EPA personnel to "go beyond ABEL" and assess ability to pay in cases where the ABEL computer model produces a negative or ambiguous result. Because ABEL is designed as a conservative screening tool that focuses only on internal cash flow, it may produce a negative or ambiguous result when a violator has the ability to pay through other means, such as reduction of unnecessary expenses, sale of or borrowing against assets, or assumption of additional debt.

The guidance gives step-by-step instructions on how to investigate potential sources of funds, and contains worksheets to guide this analysis and to draw attention to key information in tax returns and/or other financial statements. The analysis focuses on identifying luxury assets, undervalued assets, loans to or from officers and shareholders, unnecessary officers' salaries, and certain other expenses. The result is a more sophisticated analysis than that provided by ABEL.

The guidance suggests methods of adjusting an ABEL input to allow ABEL to estimate the ability to pay of sole proprietors, partnerships, and Subchapter S corporations. Also, the guidance provides additional cautions that help to clarify when a financial analyst should be consulted.

3. Individual Ability to Pay Guidance [June 1992]

If a violator files only an individual federal income tax return, ABEL cannot be used. The *Individual Ability to Pay Guidance* was developed by Industrial Economics, Inc., the EPA contractor that supports the ABEL model, for sole proprietor, partnership and individual inability to pay claims in the State of Iowa's underground storage tank (UST) program.

Although this document was not written by EPA, it can be useful in a case involving an individual's inability to pay claim. This document is not a computer program but provides a method to determine an individual's ability to pay. In a method that is similar to the ABEL model, this document draws information from individual tax forms, including Form 1040, Form 1040A, or Form 1040EZ.

This document characterizes the financial strengths and weakness of an individual in comparison to averages determined from income level, family size and county of residence. The document relies on income and expense information to project the availability of income after the payment of identified expenses and to determine if additional debt capacity exists.

The guidance provides advice on how to make a final ability to pay determination, including instructions on topics such as: how to understand the results, when it is appropriate to do additional research and verification (including consultation with a financial analyst), and how to consider extenuating financial circumstances (e.g., current sale or purchase of real estate).

4. Guidance for Calculating Municipal and Not-for-Profit Organizations' Ability to Pay Civil Penalties Using Current Fund Balances [March 1993]

This is a pilot guidance document developed by the Office of Prevention, Pesticides, and Toxic Substances (OPPTS) for use in determining the ability of governmental entities (municipalities) and other not-for-profit (NFP) organizations to pay civil penalties. The document suggests a method of determining the ability to pay from unreserved funds. It does not evaluate other methods of paying for the proposed settlement such as borrowing, raising taxes or paying over time.

The document describes how to use NFP financial statements to perform an ability to pay assessment for three types of organizations: (1) municipalities and states; (2) private colleges and universities; and (3) NFP hospitals. This document also contains background information on financial accounting practices and types of financial statements used by NFP entities, which differ from those used by for-profit companies.

5. The Road to Financing, Assessing and Improving Your Community's Creditworthiness [September 1992]

Developed by the Office of Water, this document provides brief descriptions of municipal financial characteristics and discusses how changes in these financial characteristics will project improvement in a municipality's financial health. It is a useful tool in describing some of the concepts of assessing the ability to pay of a municipality. This document may be useful for those who are unfamiliar with municipal financial characteristics.

6. **Financial Capability Guidebook**
[March 1984]

This Office of Water document is to be used to determine whether a municipality can demonstrate that it can ensure adequate building, operation, maintenance and replacement of a publicly owned treatment works. The most important section of this guidebook is the Supplemental Information Sheet and instructions (pages 52-68). The instructions allow for a characterization of a municipality that is equivalent to what the ABEL analysis does for a business. However, there is one major note of caution. The analysis is not intended for a Superfund ability to pay analysis but for the construction and operation of a publicly owned treatment works. For this reason, the *Guidebook* provides a higher ability to pay estimate than may be applicable.

7. **Financial Review Methodology for Wastewater Discharge Noncompliance Cases**
[September 17, 1984]

This document was prepared by Peat Marwick, an accounting firm, for EPA Region V. The methodology is similar to that in the *Financial Capability Guidebook*, but it allows for a greater number of years of financial information to be examined and a more detailed discussion of the financial indicators. The document has the same limitation as the *Financial Capability Guidebook*, in that it subjects the municipality to a more rigorous standard than Superfund ability to pay settlements.

8. **Ability to Pay Interrogatories**
[June 16, 1994]

This draft OECA document provides model interrogatories, requests for production, and judicial and administrative subpoenas for discovery of information and documents in cases where ability to pay is an issue. The interrogatories are intended to be tailored to specific cases, taking into account the size and structure of the violating entity.

Separate model interrogatories and requests for production of documents are provided for: (1) corporations; and (2) individuals and sole proprietors. Interrogatories to corporations request information on: corporate structure and management; equity and debt; parent and subsidiary entities; insurance coverage; tax and financial information; assets; liquidation of assets; and claims and judgments. Interrogatories to individuals and sole proprietors request information on personal and business assets, liabilities, income, expenses, and other financial matters. **[NOTE: This document can be released only to government employees.]**

9. **Ability to Pay Case Memorandum**
[August 1, 1993]

This Office of Enforcement document summarizes all the significant cases in the area of ability to pay, as of the date of issuance. The memorandum summarizes environmental case law related to topics such as: application of statutory provisions that require ability to pay to be considered in civil penalty assessments (e.g., section 109(a)(3) of CERCLA); which party has the burden of proving an ability (or inability) to pay; factors that may be considered in assessing ability to pay; alternative payment plans; and types of financial information that may be presented to a court on ability to pay issues. **[NOTE: This document can be released only to government employees.]**

ADDITIONAL INFORMATION

If you have any questions or comments on this Fact Sheet, please contact **Bob Kenney (703-603-8931)** or **Leo Mullin (703-603-8975)** of the OSRE Policy and Program Evaluation Division (PPED).

If you would like copies of the documents summarized in this Fact Sheet, they are available from the following sources. Documents identified by an asterisk (*) are found in the *CERCLA Enforcement Policy Compendium*. Copies of the complete Compendium or individual documents may be ordered by EPA personnel from the **Superfund Document Center (703-603-8917)**. [If requesting the complete Compendium, ask for Documents # PB-93-963623 and PB-92-963623; if requesting specific documents, ask for the OSWER document number listed above.] Other referenced documents are available from **Tracy Gipson (202-260-3601)** of the OSRE Regional Support Division.

United States
Environmental Protection
Agency

Office of
Site Remediation
Enforcement

May 1995

EPA

Use of Alternative Dispute Resolution in Enforcement Actions

Introduction

Alternative Dispute Resolution (ADR) is a tool which enhances the negotiating process. ADR is a standard component of EPA's enforcement program. It should be considered at any point when negotiations are possible. This fact sheet answers common questions about the use of ADR in enforcement actions and describes how to use ADR in your case. This is the first in a series of Fact Sheets on ADR use.

What is ADR?

ADR is a short-hand term for a set of processes which assist parties in resolving their disputes quickly and efficiently. Central to each method of ADR is the use of an objective third party or neutral. In this fact sheet the use of the term "ADR" refers to all methods of ADR. The methods used by the Agency include the following:

- **Mediation** is the primary ADR tool used by EPA. It is a process in which a third party, with no decision-making authority, assists disputants to reach a voluntary negotiated settlement. In mediation, EPA retains its control of the case as well as its settlement authority.
- **Convening** involves the use of a third party to organize disputants for negotiations and assist them in deciding whether to use ADR and in the selection of an appropriate ADR professional.
- **Allocation** is the use of third party neutrals to assist the parties in determining their relative responsibilities for Superfund site costs.
- **Fact-finding**, often used in technical disputes, involves the use of a third party with subject-matter expertise to investigate and determine findings of fact.
- **Arbitration** is a decision-making process which can be binding or non-binding. A third party hears the dispute and renders a decision. EPA may enter into binding arbitration for cost recovery claims below $500,000 under CERCLA 122(h)(2), 42 U.S.C. 9622(h)(2).

What is EPA's Policy On Use of ADR?

Use of ADR in appropriate cases has been EPA policy since 1987 (Guidance on the Use of ADR in Enforcement Actions, August 1987). The Administrative Dispute Resolution Act of 1990, (P.L. 101-552), 5 U.S.C. 581, strengthened EPA policy by encouraging the use of ADR in all federal disputes. Also, in 1990 the Civil Justice Reform Act was passed, authorizing that district court judges require parties to attempt mediation prior to litigation. A companion to these Acts, the Executive Order on Civil Justice Reform (No. 12778, October 23, 1991), requires all federal enforcement staff to attempt settlement, and offer use of ADR as appropriate, prior to initiating any litigation.

What is EPA's experience with ADR?

The Agency has used ADR to assist in the resolution of over 50 enforcement-related disputes to date. ADR has been used in negotiations arising under Superfund and the principal environmental statutes that EPA administers. Mediated negotiations have ranged from two-party Clean Water Act cases to Superfund disputes involving upwards of 1200 parties.

Participants in the 1990 ADR pilot for Superfund cases reported the following benefits: constructive working relationships were developed; obstacles to agreement and the reasons therefore were quickly identified; costs of preparing a case for DOJ referral were eliminated; and ongoing relationships were preserved.

What are the benefits of using ADR?

- It lowers the transaction costs for resolving the dispute.
- Mediated negotiations tend to focus more on resolving real issues, rather than posturing, and are less likely to get derailed by personality conflicts.

- In mediation, the parties are more likely to identify settlement options that are tailored to their particular needs.
- It alleviates the time-consuming burdens on EPA of organizing negotiations because a third party neutral is available to handle these tasks. This is particularly valuable in multi-party cases.

How do I know that ADR is appropriate for my case?

If you can answer the following questions affirmatively, then ADR may be appropriate for your case:

- Are there present or foreseeable difficulties in the negotiation which will require time or resources to overcome in order to reach settlement?
- Is your case negotiable, i.e. no precedent-setting issues are involved?
- Is there enough case information to substantiate the violation(s)?
- Is there sufficient time to negotiate in light of court or statutory deadlines, or are the parties willing to sign a tolling agreement (an understanding that a statutory deadline for starting a lawsuit will be extended)?

What ADR is NOT!

- A sign of weakness in the government's case
- A sign of weakness in the government attorneys' negotiation skills
- A depreciation of the government's potential recovery
- A last resort

What ADR services are available?

Assistance regarding the use of ADR is available at any time by phone from the HQ ADR Team and the regional ADR Specialists, who are identified at the end of this fact sheet. EPA has an indefinite services contract for dispute resolution services with RESOLVE, a nationally recognized ADR firm, to provide a wide range of ADR services to case team members. Services available include confidential consultation regarding use of ADR in specific cases, assistance in the location, selection and contracting of ADR professionals, and provision of neutral party services on behalf of the U.S. Trips to regional offices to assist in reviewing cases appropriate for ADR use can be arranged upon request.

How do I find out if anyone in my Region has used ADR?

Speak with your regional ADR Specialist and get a copy of recent ADR status reports.

How do I nominate a Superfund, RCRA corrective action, or Oil Pollution Act case for ADR?

It is a very simple process. For these disputes the ORC staff attorney should prepare a 1-2 page ADR nomination memorandum briefly outlining the substance of the case, the nature of the dispute, and the reasons that ADR would be of benefit to regional settlement efforts. This memorandum will be used as the basis for establishing a contract with the selected ADR professional. The ORC staff attorney should forward the nomination memo to the Regional Counsel, or designee, who has authority to approve the nomination. Then the appropriate regional official needs to commit funding for ADR services.

Consultation with one of the ADR Specialists on the use of ADR in a case should be obtained before the case is nominated. A copy of the nomination memo should be sent to the HQ ADR Liaison and your regional ADR Specialist. A model nomination memorandum is available on disk from your regional ADR Specialist.

What funding is available to pay for EPA's share of ADR expenses in these cases?

Beginning in FY '96 funding for ADR services will shift from HQ to the Regions and will be included as part of each Region's annual extramural Superfund budget based on regional need. If any Region is short of funds, please contact David Chamberlain, at 202-260-4118, and David Batson, HQ ADR Liaison, at 703-603-9004. Additional funding will be provided from the Office of Site Remediation Enforcement (OSRE) based on justified need.

What do I do for cases that arise under other statutes?

For other enforcement cases, the ADR nomination memorandum should be sent to the Division Director within the Office of Regulatory Enforcement who has responsibility for the statute under which the civil action is brought, with a copy to the HQ ADR Liaison and your regional ADR Specialist. The appropriate media program office is consulted upon receipt of the nomination. Funding for non-Superfund cases is approved on a case-by-case basis.

What contract mechanisms are available to obtain ADR services?

The following options are available: (1) the indefinite services contract with RESOLVE, which is managed by the Office of Policy, Planning and Evaluation (OPPE) (Debbie Dalton, Project Officer, 202-260-5495) and (2) expedited sole source contracting authorized by recent changes to federal acquisition regulations. The Regional Enforcement Support Services (ESS) contract may be used to obtain services to support the ADR neutral's efforts. To date, the RESOLVE contract has been the primary vehicle used by the ADR program.

A procurement request and other contracting documents must be submitted for each case to the appropriate contract official, following regional approval of the ADR nomination memorandum. It takes approximately 30 days to process the contracting documents through the contracts office. Models of an ADR procurement request and other contracting documents are available on disk from the HQ ADR Team or your regional ADR Specialist. Each Region should designate a lead staff contact for contract coordination.

Who manages the contract with the selected ADR neutral?

Each site-specific use of ADR requires either a separate contract or delivery order which is managed by the nominating region. To establish a contract or delivery order, the contracts office requires the designation of a Contracting Officer's Representative (COR).[1] The Remedial Project Manager (RPM), On Scene Coordinator (OSC), or other person familiar with the case may serve as a COR.

How does a case team select and contract with an ADR neutral for his/her services? How long does this take?

The selection of an appropriate ADR neutral for a case is by agreement of all parties to the dispute. The regional/DOJ case team represents the U.S. in this decision. Assistance in identifying and considering appropriate neutrals is available from the HQ ADR Team or through EPA's contractor.

The services of the selected ADR neutral are obtained by all the parties to a dispute by entering a contract with the neutral. The contract, generally called a "mediation agreement", covers arrangements for sharing and paying the mediator's fees, the role of the mediator, confidentiality, and the right of any party to withdraw from the mediation. An EPA approved model mediation agreement is available on disk from your regional ADR Specialist or from the HQ ADR Team. You should use this as the basis for your negotiations.

The agreement is negotiated by the case team and the private parties, with assistance, if needed, from the HQ ADR Team or an ADR expert from RESOLVE. Experience has shown that the model agreement is generally acceptable to private parties and it should take no longer than two weeks to obtain a signed agreement.

Does a Region have the authority to sign the agreement with the ADR professional?

Yes. Once the funding has been committed by the Agency, the Region, generally the staff attorney, signs the agreement for EPA.

How much does it usually cost to use ADR in a case?

The cost of ADR services is determined by several factors, including the ADR professional's fees and travel, costs of meeting space, and the length of settlement discussions. All costs associated with the selected ADR process are shared equitably among the parties. EPA staff should keep the Agency's share payment commensurate with EPA's interest in the ADR process. At present, the Agency may pay 100% of the convening process and up

[1] Under the new contracting regulations, all Delivery Order Project Officers (DOPOs) and Work Assignment Managers (WAMs) are referred to as CORs.

to 50% of the ADR costs, where the Agency is a party to the selected ADR process. The estimated average historic mediation cost to EPA in Superfund cases is approximately $20,000. Given the smaller number of parties generally involved, it is anticipated that the cost of mediating a RCRA case will be less expensive than for Superfund actions.

The Agency may, in appropriate circumstances, help to defray private parties' costs of obtaining ADR services in allocation deliberations. The Agency may pay up to 20% of the costs of ADR services in these situations.

Why must the costs associated with using ADR in an enforcement actions be shared equitably by the parties?

Two reasons. First, to enhance the neutrality of the ADR professional involved, it is important that the costs be shared by all parties to the extent possible. Second, several federal statutes, including the Miscellaneous Receipts Act, prohibit an agency from augmenting its congressionally-approved budget with services paid for by outside parties. Therefore, EPA must share the costs of a neutral's services with the other parties to an enforcement dispute.

Are government payments made to an ADR professional in a Superfund action tracked and recoverable as site costs for cost recovery purposes?

Expenditures by the Agency in support of the use of ADR in a Superfund action are cost recoverable expenses, reimbursement of which may be obtained through regional settlements or legal action. Regions may exercise their enforcement discretion regarding recovery of ADR expenditures. Each ADR case is assigned a separate delivery order or contract to allow for site tracking of ADR expenses.

Is ADR training available?

Yes. A one day overview training on the use of ADR in enforcement negotiations is offered in all of the regions each year. Furthermore, there are ADR components in several other popular EPA training courses. If you are interested in the training schedule for the current year call Rhonda Pierce at 202-260-8174.

How do I get copies of ADR guidances, reports and other related information?

The materials listed below are available at no charge to EPA employees from the National Technical Information Service (NTIS) (phone: 703-487-4650). You will need to provide NTIS with the number in brackets.

"Guidance on Use of ADR in Enforcement Cases" (1990), [PB94-963669], OSWER No. 9208.0-10.

"Guidance on Use of ADR for Litigation in Federal Courts" (DOJ, 1992), [PB94963-668], OSWER No. 9208.0-09.

"Enforcement Mediation-Status on Use of ADR in Enforcement Actions", [PB94963670], OSWER No. 9208.0-11.

"Superfund Enforcement Mediation Region V Pilot Results", [PB94-963671], OSWER No. 9208.0-12.

"Superfund Enforcement Mediation Case Studies", [PB94-963672], OSWER No. 9208.0-13.

ADR Specialists

Office	Name	Phone #	Fax #
Region 1	Ellie Tonkin	617/565-1154	565-1141
	Marcia Lamel	565-3435	
	Bruce Marshall*	573-9686	573-9662
Region 2	Tom Lieber	212/637-3158	637-3115
	Elena Kissel	637-3182	
	Janet Feldstein*	637-4417	637-4429
Region 3	Pat Hilsinger	215/597-2618	597-3235
	Laura Janson*	597-2393	597-9890
Region 4	Simon Miller	404/347-2641 x 2282	347-5246
	Charles Swan*	347-5059 x6194	347-7817
Region 5	John Tielsch	312/353-7447	886-7160
	Tinka Hyde*	886-9296	886-4071
Region 6	Miles Schulze	214/665-8049	665-2192
	Jim Dahl	665-2151	
	Carl Bolden*	665-6713	665-6460
Region 7	Bob Richards	913/551-7502	551-7925
	Linda Garwood*	551-7268	551-7063
Region 8	Suzanne Bohan	303/294-7591	294-7653
	Barry Levene*	293-1843	293-1238
Region 9	Shauna Woods	415/744-1360	744-1041
	Kim Muratore*	744-2373	744-1917
Region 10	Ted Yackulic	206/553-1218	553-0163
	Steve Mullen*	553-6520	553-0124

*Waste Management or Hazardous Waste division contact. Other names are in ORC.

HQ ADR Team	Name	Phone #	Fax #
ADR Liaison	David Batson	703/603-9004	603-9117 603-9119
OSRE/RSD	Rhonda Pierce	202-260-8174	260-3069
OSRE/PPED	Ellen Kandell	703/603-8996	603-9117

United States
Environmental Protection
Agency

Office of Enforcement and
Compliance Assurance

November 1995

EPA

Policy Toward Owners of Property Containing Contaminated Aquifers

Office of Site Remediation Enforcement
Policy and Program Evaluation Division 2273G

This fact sheet summarizes a new EPA policy regarding groundwater contamination. The "Policy Toward Owners of Property Containing Contaminated Aquifers" was issued as part of EPA's Brownfields Economic Redevelopment Initiative which helps states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields. Brownfields are abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.

EPA issued this policy to help owners of property to which groundwater contamination has migrated or is likely to migrate from a source outside the property. This fact sheet is based on EPA's interpretation of the Comprehensive Environmental Response, Compensation , and Liability Act (CERCLA, commonly known as Superfund) and existing EPA guidance. Under the policy, EPA will not take action to compel such property owners to perform cleanups or to reimburse the agency for cleanup costs. EPA may also consider *de minimis* settlements with such owners if they are threatened with law suits by third parties.

Background

Approximately eighty-five percent of the sites listed on the National Priorities List involve some degree of groundwater contamination. The effects of such contamination are often widespread because of natural subsurface processes such as infiltration and groundwater flow. It is sometimes difficult to determine the source of groundwater contamination.

Under Section 107(a)(1) of CERCLA (also found at 42 United States Code § 9607(a)(1)), any "owner" of contaminated property is normally liable regardless of fault. This section of CERCLA creates uncertainty about the liability of owners of land containing contaminated aquifers who did not cause the contamination. This uncertainty makes potential buyers and lenders hesitant to invest in property containing contaminated groundwater. The intent of the Contaminated Aquifer Policy is to lower the barriers to the transfer of property by reducing the uncertainty regarding future liability. It is EPA's hope that by clarifying its approach towards these landowners, third parties will act accordingly.

Policy Summary

EPA will exercise its enforcement discretion by not taking action against a property owner to require clean up or the payment of clean-up costs where: 1) hazardous substances have come to the property solely as the result of subsurface migration in an aquifer from a source outside the property, and 2) the landowner did not cause, contribute to, or aggravate the release or threat of release of any hazardous substances. Where a property owner is brought into third party litigation, EPA will consider entering a *de minimis* settlement.

Elements of the Policy

There are three major issues which must be analyzed to determine whether a particular landowner will be protected from liability by this policy:

- the landowner's role in the contamination of the aquifer;
- the landowner's relationship to the person who contaminated the aquifer; and
- the existence of any groundwater wells on the landowner's property that affect the spread of contamination within the aquifer.

Landowner's Role in the Contamination of the Aquifer

A landowner seeking protection from liability under this policy must not have caused or contributed to the source of contamination. However, failure to take steps to mitigate or address groundwater contamination, such as conducting groundwater investigations or installing groundwater remediation systems, will not, in the absence of exceptional circumstances, preclude a landowner from the protection of this policy.

Landowner's Relationship to the Person who Caused the Aquifer Contamination

First, this policy requires that the original contamination must not have been caused by an agent or employee of the landowner. Second, the property owner must not have a contractual relationship with the polluter. A contractual relationship includes a deed, land contract, or instrument transferring possession. Third, Superfund requires that the landowner inquire into the previous ownership and use of the land to minimize liability. Thus, if the landowner buys a property from the person who caused the original contamination after the contamination occurred, the policy will not apply if the landowner knew of the disposal of hazardous substances at the time the property was acquired. For example, where the property at issue was originally part of a larger parcel owned by a person who caused the release and the property is subdivided and sold to the current owner, ***who is aware of the pollution and the subdivision***, there may be a direct or indirect "contractual relationship" between the person that caused the release and the current landowner. In this instance, the owner would not be protected by the policy.

In contrast, land contracts or instruments transferring title are not considered contractual relationships under CERCLA if the land was acquired after the disposal of the hazardous substances and the current landowner did not know, and had no reason to know, that any hazardous substance had migrated into the land.

The Presence of a Groundwater Well on the Landowner's Property and its Effects on the Spread of Contamination in the Aquifer

Since a groundwater well may affect the migration of contamination in an aquifer, EPA's policy requires a fact-specific analysis of the circumstances, including, but not limited to, the impact of the well and/or the owner's use of it on the spread or containment of the contamination in the aquifer.

Common Questions Regarding Application of the Policy

"If a prospective buyer knows of aquifer contamination on a piece of property at the time of purchase, is he or she automatically liable for clean-up costs?"

No. In such a case the buyer's liability depends on the seller's involvement in the aquifer contamination. If the seller would have qualified for protection under this policy, the buyer will be protected. For example, if the seller of the property was a landowner who bought the property without knowledge, did not contribute to the contamination of the aquifer and had no contractual relationship with the polluter, then the buyer may take advantage of this policy, ***despite*** knowledge of the aquifer contamination.

In contrast, if the seller has a contractual relationship with the polluter and the buyer ***knows*** of the contamination, then this policy will not protect the buyer.

"If an original parcel of property contains one section which has been contaminated by the seller and another uncontaminated section which is threatened with contamination migrating through the aquifer, can a buyer be protected under the policy if he or she buys the threatened section of the property?"

The purchase of the threatened parcel separate from the contaminated parcel establishes a contractual relationship between the buyer and the person responsible for the threat. This policy will not protect such a buyer unless the buyer can establish that he or she did not know of the pollution at the time of the purchase and had no reason to know of the pollution. To establish such lack of knowledge the buyer must prove that at the time he acquired the property he inquired into the previous ownership and uses of the property.

Protection from Third Party Law Suits

Finally, EPA will consider *de minimis* settlements with landowners who meet the requirements of this policy if a landowner has been sued or is threatened with third-party suits. A *de minimis* settlement is an agreement between the EPA and a landowner who may be liable for clean up of a small portion of the hazardous waste at a particular site. To be eligible for such a settlement, the landowner must not have handled the hazardous waste and must not have contributed to its release or the threat of its release. Once the EPA enters into a *de minimis* settlement with a landowner, third parties may not sue that landowner for the costs of clean-up operations.

Whether or not the Agency issues a *de minimis* settlement, EPA may seek the landowner's full cooperation (including access to the property) in evaluating and implementing cleanup at the site.

For Further Information

This policy was issued on May 24, 1995 and published in the *Federal Register* on July 3, 1995 (volume 60, page 34790). You may order a copy of the policy from the National Technical Information Service (NTIS), U.S. Department of Commerce, 5825 Port Royal Rd., Springfield, VA 22161.

Orders must reference NTIS accession number **PB96-109145.**

For telephone orders or further information on placing an order, call NTIS at:
(703)487-4650 for regular service, or
(800)553-NTIS for rush service.

For orders via e-mail/Internet, send to the following address:
orders@ntis.fedworld.gov

For more information about the Contaminated Aquifer Policy, call Ellen Kandell at (703)603-8996.

United States Environmental Protection Agency | Office of Enforcement and Compliance Assurance | December 1995

EPA

The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities

Office of Site Remediation Enforcement | Quick Reference Fact Sheet

Units of state, local, and federal government sometimes involuntarily acquire contaminated property as a result of performing their governmental duties. Government entities often wonder whether these acquisitions will result in Superfund liability. This fact sheet summarizes EPA's policy on Superfund enforcement against government entities that involuntarily acquire contaminated property. This fact sheet also describes some types of government actions that EPA believes qualify for a liability exemption or a defense to Superfund liability.

Introduction

EPA's Brownfields Economic Redevelopment Initiative is designed to help states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields. Brownfields are abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. Many municipalities and other government entities are eager for brownfields to be redeveloped, but often hesitate to take any steps at these facilities because they fear that they will incur Superfund liability.

This fact sheet answers common questions about the effect of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as Superfund, and set forth at 42 United States Code beginning at Section 9601) on involuntary acquisitions by government entities. EPA hopes that this fact sheet will facilitate government entities' plans for redevelopment of brownfields and the "brokerage" of those facilities to prospective purchasers.

What is an involuntary acquisition?

EPA considers an acquisition to be "involuntary" if it meets the following test:

- The government's interest in, and ultimate ownership of, the property exists only because **the actions of a non-governmental party give rise to the government's legal right to control or take title to the property**.

For example, a government's acquisition of property for which a citizen failed to pay taxes is an involuntary acquisition because the citizen's tax delinquency gives rise to the government's legal right to take title to the property.

Will a government entity that involuntarily acquires contaminated property be liable under CERCLA?

To protect certain parties from liability, CERCLA contains both liability exemptions and affirmative defenses to liability. A party who is exempt from CERCLA liability with respect to a specified act cannot be held liable under CERCLA for committing that act. A party who believes that he or she has an affirmative defense to CERCLA liability must prove so by a preponderance of the evidence.

After it involuntarily acquires contaminated property, a unit of state or local government will generally be exempt from CERCLA liability as an owner or operator. In addition, the unit of state or local government will have a somewhat redundant affirmative defense to CERCLA liability known as a "third-party" defense, provided other requirements for the defense, which are described below, are met. A federal government entity that involuntarily acquires contaminated property and meets the requirements described below will have a third-party defense to CERCLA liability.

The requirements for a third-party defense to CERCLA liability are the following:

- The contamination occurred before the government entity acquired the property;
- The government entity exercised due care with respect to the contamination (e.g., did not cause, contribute to, or exacerbate the contamination); and
- The government entity took precautions against certain acts of the party that caused the contamination and against the consequences of those acts.

A government entity will not have a CERCLA liability exemption or defense if it has caused or contributed to the release or threatened release of contamination from the property. As a result, acquiring property involuntarily does not unconditionally or permanently insulate a government entity from CERCLA liability. Government entities should therefore ensure that they do not cause or contribute to the actual or potential release of hazardous substances at facilities that they have acquired involuntarily. For more information, see 42 U.S.C. 9601(20)(D), 9607(b)(3), and 9601(35)(A) and (D).

It is also important to note that the liability exemption and defense described above do not shield government entities from any potential liability that they may have as "generators" or "transporters" of hazardous substances under CERCLA. For additional information, see 42 U.S.C. 9607(a).

What are some examples of involuntary acquisitions?

CERCLA provides a non-exhaustive list of examples of involuntary acquisitions by government entities. These examples include **acquisitions following abandonment, bankruptcy, tax delinquency, escheat** (the transfer of a deceased person's property to the government when there are no competent heirs to the property), **and other circumstances in which the government involuntarily obtains title by virtue of its function as a sovereign.**

What is EPA's official policy regarding CERCLA enforcement against government entities that involuntarily acquire contaminated property?

In 1992, EPA issued its Rule on Lender Liability Under CERCLA ("Rule"), 57 *Federal Register* 18344 (April 29, 1992). The Rule included a discussion of involuntary acquisitions by government entities. In 1994, the Rule was invalidated by the court.

In September 1995, EPA and the U.S. Department of Justice (DOJ) issued their "Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily" ("Lender Policy"). In the document, EPA and DOJ reaffirm their intentions to follow the provisions of the Rule as enforcement policy. The Lender Policy advises EPA and DOJ personnel to consult both the Rule and its preamble while exercising their enforcement discretion with respect to government entities that acquire property involuntarily. Most of the relevant portions of the Rule and preamble have been summarized in this fact sheet.

Under the Lender Policy, EPA has expanded the examples listed in CERCLA by describing the following categories of involuntary acquisitions:

- Acquisitions made by government entities **acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority** (such as acquisition of the security interests or properties of failed private lending or depository institutions);
- Acquisitions by government entities through **foreclosure and its equivalents while administering a governmental loan, loan guarantee, or loan insurance program**; and
- Acquisitions by government entities **pursuant to seizure or forfeiture authority**.

Similar to the examples listed in CERCLA, EPA's list of categories of involuntary acquisitions is non-exhaustive. To determine whether an activity not listed in CERCLA or under the Lender Policy is an "involuntary acquisition," one should analyze whether the actions of a non-governmental party give rise to the government's legal right to control or take title to the property.

If a government entity takes some sort of voluntary action before acquiring the property, can the acquisition still be considered "involuntary"?

Yes. Involuntary acquisitions, including the examples listed in CERCLA, generally require some sort of discretionary, volitional action by the government. A government entity need not be completely "passive" in order for the acquisition to be considered "involuntary" for purposes of CERCLA. For further discussion, see 57 *Fed. Reg.* 18372 and 18381.

Will a government entity that involuntarily acquires contaminated property be liable under CERCLA to potentially responsible parties and other non-federal entities?

If a unit of state or local government involuntarily acquires property through any of the means listed in CERCLA, it will be exempt from CERCLA liability as an owner or operator. In addition, any government entity will have a third-party defense to CERCLA liability if all relevant requirements for that defense are met (see above).

If a government entity acquires property through any other means, it appears likely — based on the way that courts have treated lender issues during the last few years — that a court would apply principles and rationale that are consistent with EPA and DOJ's Lender Policy. Analysis of these acquisitions may require an examination of case law and state or local laws.

If someone dies and leaves contaminated property to a government entity, is this considered an involuntary acquisition?

No, this type of property transfer is not considered an involuntary acquisition under CERCLA. However, CERCLA provides a third-party defense for parties that acquire property by inheritance or bequest (a gift given through a will). Thus, a government entity that acquires property in this manner will have a third-party defense to CERCLA liability if all relevant requirements of that defense are met and the government entity has not caused or contributed to the release or threatened release of contamination from the property (see above). For more information, see 42 U.S.C. 9607(b)(3) and 9601(35)(A) and (D).

Will a government entity that uses its power of eminent domain be liable under CERCLA?

After a government entity acquires property through the exercise of eminent domain (the government's power to take private property for public use) by purchase or condemnation, it will have a third-party defense to CERCLA liability if all requirements for that defense are met (see above). For more information, see 42 U.S.C. 9607(b)(3) and 9601(35)(A).

Will parties that purchase contaminated property from government entities also be exempt from CERCLA liability?

No. Nothing in CERCLA allows non-governmental parties to be exempt from liability after they knowingly purchase contaminated property. However, EPA encourages prospective purchasers of contaminated property to contact their state environmental agencies to discuss these properties on a site-by-site basis. At sites where an EPA action has been taken, is ongoing, or is anticipated to be undertaken, various tools, including "prospective purchaser agreements," may be an option.

For Further Information

The Lender Policy was published in the *Federal Register* in Volume 60, Number 237, at pages 63517 to 63519 (December 11, 1995).

You may order copies of the Lender Policy from the National Technical Information Service (NTIS), U.S. Department of Commerce, 5285 Port Royal Rd., Springfield, VA 22161. Orders must reference NTIS accession number **PB95-234498**. For telephone orders or further information on placing an order, call NTIS at **703-487-4650** for regular service or **800-553-NTIS** for rush service. For orders via e-mail/Internet, send to the following address:

orders@ntis.fedworld.gov

If you have questions about this fact sheet, contact Laura Bulatao of EPA's Office of Site Remediation Enforcement at (202) 564-6028.

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Using Supplemental Environmental Projects to Facilitate Brownfields Redevelopment

Office of Site Remediation Enforcement
Policy and Program Evaluation Division 2273A

In April 1998, EPA issued the final "Supplemental Environmental Projects Policy." In that policy EPA encourages the use of Supplemental Environmental Projects in the settlement of environmental enforcement actions. Using SEPs to assess or cleanup brownfield properties is an effective way to enhance the environmental quality and economic vitality of areas in which the enforcement actions were necessary.

Introduction

In settlements of environmental enforcement cases, defendant/respondents often pay civil penalties. EPA encourages parties to include Supplemental Environmental Projects (SEPs) in these settlements and will take SEPs into account in setting appropriate penalties. While penalties play an important role in deterring environmental and public health violations, SEPs can play an additional role in securing significant environmental and public health protection and improvement. EPA's final Supplemental Environmental Projects Policy (SEP Policy) describes seven categories of SEPs, the legal guidelines for designing such projects, and the methodology for calculating penalty credits. In certain cases, SEPs may facilitate the reuse of "brownfield" property. This fact sheet answers common questions about how SEPs can be used in the brownfields context.

What are Brownfields?

EPA defines brownfields as abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. In many cases assessment of the environmental condition of a property is all that is necessary to spur its reuse. Through the Brownfields Economic Development Initiative, EPA has developed a number of tools to prevent, assess, safely cleanup and promote the sustainable reuse of brownfields. SEPs are one of the tools that can be used at brownfields properties.

What is a SEP?

A SEP is an environmentally beneficial project that a defendant/respondent agrees to undertake in settlement of a civil penalty action, but that the defendant/respondent is not otherwise legally required to perform. In return, a percentage of the SEP's cost is considered as a factor in establishing the amount of a final cash penalty. SEPs enhance the environmental quality of communities that have been put at risk due to the violation of an environmental law.

Meeting Legal Requirements

The SEP Policy has been carefully structured to ensure that each SEP negotiated by EPA is within the Agency's authority and consistent with statutory and Constitutional requirements. Although all of the legal requirements in the Policy must be met when considering a SEP at a brownfield, the following requirements are particularly important:

SEPs at Brownfields Cannot Include Action that the Defendant/Respondent is Otherwise Legally Required to Perform

Activities at a brownfield site for which the defendant/respondent is otherwise legally required to perform under federal, state, or local law or regulation cannot constitute a SEP. This restriction includes actions that the defendant/respondent is likely to be required to perform (1) as injunctive relief in any action brought by EPA or another regulatory agency, or (2) as part of an order or existing settlement in another legal action. This restriction does not pertain to actions that a regulatory agency could compel the defendant/respondent to undertake if the Agency is *unlikely* to exercise that authority.

As a general rule, if a party owns a brownfield or is responsible for the primary environmental degradation at a site, assessment or cleanup activities cannot constitute a SEP.

SEPs at Brownfields Require an Adequate Nexus between the Violation and the Project

The SEP Policy requires that a relationship, or nexus, exist between the violation and the proposed project. A SEP at a brownfield will generally satisfy the nexus requirement if the action enhances the overall public health or environmental quality of the area put at risk by the violation.

A SEP is not required to be at the same facility where the violation occurred provided that it is within the same ecosystem or within the immediate geographical area. In general, the nexus requirement will be satisfied if the brownfield is within a 50 mile radius of the site from which the violation occurred. However, location alone is not sufficient to satisfy the nexus requirement --- the environment where the brownfield is located must be affected or potentially threatened by the violation.

A relationship between the statutory authority for the penalty and the nature of the SEP is not required in order for the nexus test to be met. Therefore, the violation need not relate to hazardous waste or contaminated properties in order for EPA to consider a SEP at a brownfield. (e.g., in the case of a Clean Air Act violation, EPA could approve a SEP at a brownfield).

SEPs at Brownfields Cannot Include Action that the Federal Government is Likely to Undertake or Compel Another to Undertake

If EPA or another federal agency has a statutory obligation to assess, investigate, or take other response actions at a brownfield, or to issue an order compelling another to take such action, the Agency may not negotiate a SEP whereby the defendant/respondent carries out those activities.

As a general rule, SEPs are inappropriate at the following site types because of EPA's statutory obligations:

- sites on the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), § 105, 40 CFR Part 300, Appendix B;

- sites where the federal government is planning or conducting a removal action pursuant to CERCLA § 104(a) and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR § 300.415; and

- sites for which the defendant/respondent or other party would likely be ordered to perform an assessment, response, or remediation activity pursuant to CERCLA § 106, the Resource Conservation and Recovery Act (RCRA), § 3013, § 7003, § 3008(h), the Clean Water Act (CWA) § 311, and other federal law.

SEPs may be Performed at Brownfields Involuntarily Acquired by Municipalities

As stated above, if EPA would likely issue an order compelling a Party to cleanup a brownfield, such remedial action cannot be the subject of a SEP. Pursuant to the portion of the CERCLA Lender Liability Rule addressing involuntary acquisitions, 40 C.F.R. § 300.115, the Agency will not issue a remediation order to a municipality that has involuntarily acquired a brownfield even if the Agency would otherwise issue such an order to a private owner. Therefore, if

(1) a brownfield is acquired involuntarily by a local government,
(2) there are no other potential liable parties, and
(3) the known level of contamination would not compel the Agency to take action itself,

a SEP at this property would be appropriate.

SEPs May Be Limited at Brownfields that Received Federal Funds

A SEP cannot provide a municipality, state, or other entity that has received a federal Brownfields Assessment Demonstration Pilot or other federal brownfields grant with additional funds to perform a specific task identified within the assistance agreement. If a defendant/respondent proposes a SEP whereby the party provides money to a local government to assess or cleanup a brownfield, the municipality must not have received a federal grant to carry out the same work. Similarly, a defendant/respondent cannot on its own undertake assessment or other response work at a brownfield when a grant recipient has received federal funds to undertake the same project. A SEP could, however, include additional cleanup activities at a site so long as those activities are not the same as those performed with federal brownfield funding. For example, at a site which a federal Brownfields Targeted Site Assessment is performed, a SEP that cleans up the same site would be an appropriate project (provided that a CERCLA 104(a) removal action is not warranted).

Selecting an Appropriate SEP Activity for a Brownfield Site

The SEP Policy identifies two categories of SEPs that are appropriate for brownfields.

Environmental Quality Assessment Projects

In general terms, environmental quality assessments involve investigating or monitoring the environmental media at a property. To be eligible as SEPs, such activities must be conducted in accordance with recognized protocols, if applicable, for the type of work to be undertaken.

Assessment projects may not, as indicated, include work that the federal government would undertake itself or issue an order to accomplish. Therefore if a SEP involves an assessment of site conditions at a brownfield, the site must not be one where EPA is planning or conducting assessment activities. Both CERCLIS and EPA's Pre-CERCLIS Screening Guidance are useful to determine whether a federal assessment is warranted or planned.

Environmental Restoration Projects

For sites at which contamination does exist, but where an EPA response action or order to a party is not warranted, a SEP may involve removing or remediating contaminated media or material. Restoration SEPs can involve restoring natural environments, such as ecosystems, or man-made environments, such as facilities and buildings. Creating conservation land, such as transforming a former landfill into wilderness land may be an appropriate SEP. The removal of substances that the federal government does not have clear authority to address, such as contained asbestos or lead paint, may also constitute an appropriate restoration project.

Community Input

No one can judge the value to a community of an assessment or cleanup project at a brownfield better than the community in which the site is located. Local communities are the most affected by environmental violations, and have the most to gain by SEPs that address their concerns. Therefore, in appropriate cases local communities should be afforded an opportunity to comment on and contribute to the design of proposed SEPs at brownfield sites. Accordingly, Regions are encouraged to promote public involvement in accordance with the Community Input procedures set forth within the SEP Policy.

Evaluation Checklist for SEPs at Brownfields

On the next page, two examples are provided to demonstrate typical proposals Regions may receive from parties that wish conduct SEPs at brownfields. One of the proposals would be approved and the other would not. A checklist of questions along with answers is provided to demonstrate the analysis Regions should apply when considering such requests.

Further Information: If you have any questions regarding this fact sheet, please contact David Gordon at (202) 564-5147 within the Office of Site Remediation Enforcement. To access the SEP Policy on the internet, open page http://es.epa.gov/oeca/sep/guiddoc.html. For Information about EPA's Brownfield Economic Development Initiative go to page http://www.epa.gov/brownfields.

Hypothetical A:

The Company A owns and operates a manufacturing facility in downtown Cityville. The company uses solvents as part of its manufacturing process. During its operation, Company A discharges wastewater into the Running River. EPA alleges that on at least one occasion, the level of solvents in the wastewater exceeded the level specified in EPA's effluent standards under the Clean Water Act.

EPA filed a civil complaint seeking penalties for the CWA violation. Company A proposed doing a SEP to partly reduce the penalty. The project involves assessing the environmental conditions of a nearby abandoned lot. The lot is owned not by the Company, but by the Cityville government, which obtained title from the previous owner via tax foreclosure. To date, Cityville has been attempting to interest developers in the property but to no avail due to concerns regarding possible contamination from a prior industrial operation at the lot. To determine the extent of contamination, Cityville recently received a federal Brownfields Assessment Demonstration Pilot.

Hypothetical B:

Company B owns and operates a factory in downtown Springfield. EPA conducted an inspection of the factory's air emissions and determined that the Company has violated certain Clean Air Act (CAA) standards resulting in the release of air pollutants into the nearby neighborhood.

EPA filed a civil complaint seeking penalties for the CAA violations. Company B proposed doing a SEP that involves the cleanup of debris at an abandoned parcel located several blocks away, downwind from Company B's factory. The lot is filled with used tires and abandoned trash, and is infested with vermin. The lot is the site of a former bakery which long ago went bankrupt. There is no history of any past industrial operation on-site.

CHECKLIST

□ **Does the project contribute to the revitalization of an abandoned, idled, or under-used industrial or commercial property where redevelopment has been complicated by real or perceived environmental contamination?**
A. Yes. Conducting soil sampling will help revitalize the abandoned lot because it will resolve the questionable environmental condition of the property that has discouraged developers.
B. Yes. Cleaning up the used tires and trash and addressing the vermin problem at this former bakery site will make the property more attractive to developers.

□ **Does the project include actions that the defendant/respondent would otherwise likely be required to perform under federal, state, or local law or regulation? Is there a court or administrative order or existing settlement agreement that would obligate the defendant/respondent to undertake the proposed project?**
A. No. Company A does not own the property, and there is no reason to suspect that Company A would be responsible for any contamination that may be discovered at the site.
B. No. Company B does not own the property, and there is no reason to suspect that the company would be required under federal, state, or local law to remove debris from the site.

□ **Is there an adequate nexus between the violation and the brownfield? Is the project within the same ecosystem or within a 50 mile radius of the facility where the violation occurred?**
A. Yes. The site is located close to the Company's facility, and the proposed SEP addresses the same ecosystem and human population threatened by the Company's wastewater discharge.
B. Yes. The abandoned parcel is located downwind of Company B's factory. The proposed SEP addresses the same ecosystem and human population threatened by the illegal air emissions.

□ **Does the SEP address environmental conditions that the federal government is statutorily obligated to either address itself or order another to address? Is the site on CERCLA's National Priorities List? Is the Agency likely to conduct a removal under CERCLA, or might the Agency order any party to perform remediation activity pursuant to CERCLA, RCRA, or the CWA?**
A. No. There is no indication that EPA has documented any contamination at the site or would investigate the abandoned lot. Therefore, there is no reason to believe that the Agency would consider conducting an investigation or removal action or compel any party to undertake such activities.
B. No. There is no indication that the federal government has a statutory obligation to remove debris from the abandoned parcel. The site is not on the National Priorities List, and there is no reason to believe that the types of debris at issue would warrant the Agency to conduct a removal action or compel any party to undertake any response activity.

□ **Does the SEP provide a municipality, state, or other entity that has received a federal brownfields grant additional funds to perform a specific task identified within the assistance agreement? Does the defendant/respondent seek to undertake work at a site where a federal grant recipient has received an award to undertake the same work?**
A. Yes. Cityville has received funding through a federal Brownfields Assessment Demonstration Pilot.
B. No. There is no indication that Springfield or any entity has received a federal grant to clean up the property.

□ **Does the SEP involve an Environmental Quality Assessment Project or an Environmental Restoration Project?**
A. Yes. The soil sampling project can be categorized as an Environmental Quality Assessment Project.
B. Yes. Removal of the debris can be categorized as an Environmental Restoration Project.

DETERMINATION

A. The SEP proposed by Company A does not satisfy all the requirements because Cityville has received funding through a National Brownfields Assessment Demonstration Pilot. (A SEP at this site that is limited to cleanup activities might be appropriate depending on the extent of contamination.)
B. The SEP proposed by Company B satisfies all requirements and may be approved.